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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER, 1990

JIMMIE D. OYLER, Petitioner

v.

THE HONORABLE EARLE D. JONES

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS**

PETITION FOR WRIT OF CERTIORARI

**Pamela S. Thompson
Attorney for Petitioner
P.O. Box 104
Horton, Kansas 66439
(913) 742-3707**



CERTIFICATE OF SERVICE

This is to certify that I, Pamela S. Thompson, deposited three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari in the United States mail, postage prepaid, first-class, addressed to Melinda S. Whitman, Assistant District Attorney, Johnson County Courthouse, P.O. Box 728, Olathe, Kansas 66061 and to Robert Stephan, Attorney General, Kansas Judicial Center, Second Floor, Topeka, Kansas on this 240 day of AUGUST, 1990.


Pamela S. Thompson

QUESTION PRESENTED

Whether, the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, the sovereignty and jurisdiction of the Cherokee Nation, the guarantees and provisions contained in the Treaties with Great Britain, France, the Shawnees, the Cherokees, and other Indian Nations and Tribes, the laws of the United States Congress, the Kansas Organic Act, the Kansas Constitution, the Kansas Enabling Act and general principles of Federal Indian law, preclude the State of Kansas, from enjoining Petitioner's Indian trade, by prosecuting Petitioner in Kansas State Courts for violations of Kansas criminal laws when Petitioner is an enrolled member of the Cherokee Nation, as a Loyal Shawnee, the successor Nation to the Shawnee Nation as it existed in 1854, and when petitioner is residing on and conducting Indian trade, from Petitioner's retail business, located on restricted Indian land, under the jurisdiction of the Cherokee Nation?



TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii-viii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTORY PROVISION INVOLVED.....	1-4
STATEMENT OF THE CASE.....	4-19
REASONS FOR GRANTING THE WRIT.....	20-65
CONCLUSION.....	65
APPENDIX.....	66-89



TABLE OF AUTHORITIES CASES

	Page
<u>Absentee Shawnee Tribe of Indians of Oklahoma v. The State Of Kansas,</u> 862 F.2d 1415 (10th. Cir. 1988).....	42,49
<u>E.E.O.C. v. Cherokee Nation,</u> 871 F.2d 937(10th Cir. 1989).....	42
<u>Ex Parte: In the matter of Kang Gi Shun Ca, Otherwise known as Crow Dog,</u> 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883).....	47
<u>Iowa Tribe of Kansas and Nebraska v. State of Kansas,</u> 787 F.2d 1434 (10th Cir. 1986).....	61
<u>John D. Brown v. Boston Steele,</u> 23 Kan. 672 (1880).....	57
<u>Menominee Tribe v. United States,</u> 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 745 (1968).....	42
<u>Moe v. Salish & Kootenai Tribe,</u> 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).....	45
<u>Oklahoma v. Klindt,</u> 782 P.2d 401 (Okla.Cr. 1989).....	63
<u>Pennock v. Board of County Commissioners of Franklin County,</u> 103 U.S. 367 (1881).....	44
<u>Rosebud Sioux Tribe v. Kneip,</u> 430 U.S. 584, 615, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).....	50
<u>Ronnie Ross v. Russell Neff,</u> ____ F.2d ____ (10th Cir. 1990).....	20

Solem v. Bartlett, 465 U.S. 463,
470, 104 S.Ct. 1161, 79 L.Ed.2d
443 (1984).....49,50

The Kansas Indians (Blue Jacket v.
The Board of Commissioners of the
County of Johnson), 72 U.S. (5 Wall)
737, (1867).....43,44

United States v. John, 437 U.S.
634, 98 S.Ct. 2541, 57 L.Ed.2d
489 (1978).....48

United States v. Michigan, 471
F. Supp. 192 (D. Mich. 1979),
653 F.2d 277 (1981), cert. denied
454 U.S. 1124 (1982).....44

Washington v. Confederated Tribes,
447 U.S. 134, 100 S.Ct. 2069, 65 L.
Ed.2d 10 (1980), reh den 448 U.S.
911 (1980).....46

Williams v. Lee, 358 U.S. 217,
79 S.Ct. 269, 3 L.Ed.2d 251 (1959).....47

Worcester v. Georgia, (U.S.)
6 Pet. 515, 8 L.Ed. 483 (1832).....47

CONSTITUTIONAL PROVISIONS

The Constitution of the State of Kansas,
Section
1.....38,78

The United States Constitution, Article VI,
cl. 2.....1,21,40

STATUTES

An Act to provide for an Exchange of Lands with the Indians residing in any of the States or Territories, and for their removal West of the River Mississippi, (Act of Congress, May 28, 1830 4 Stat. 411, Chapter 148).....	4,29,33,56,79
An Act to Organize the Territory of Kansas, (Act of May 30, 1854, ch. 59, section 19, 10 Stat. 283).....	37,80
An Act for the Admission of Kansas Into the Union (Act of January 29, 1861, ch. 20, section 1, 12 Stat. 126)..<	38,81
An Act for the Issuance of Patents (11th Section of the Act of Congress, March 3, 1858, U.S. Statutes, Vol. 11, p. 430, Sess. 11, Ch. 82, 1859, 35th Congress.....	3,36,82
An Act to Provide for the partitioning of certain restricted Indian land in the State of Kansas, (Act of October 15, 1982, Public Law 97-344, 96 Stat. 1645).....	51,82
An Act to Provide for the Use and Distribution of funds awarded to the Shawnee Tribe of Indians in dockets 64, 335, and 338 by the Indian Claims Commission and docket 64-A by the United States Court of Claims, and for other Purposes, (Act of December 20, 1982, Public Law 97-372, 96 Stat. 1815).....	59,83

K.S.A. 79-3321(a).....	4,10,18,84
K.S.A. 79-3321(n).....	4,10,17,84
K.S.A. 79-3321(h).....	10,84
18 U.S.C. section 1151.....	3,48,85
18 U.S.C. section 3243.....	3,60,62,85
25 U.S.C. section 1321, <u>et seq.</u>	3,63,86
28 U.S.C. section 1254 (1).....	1,87

TREATIES

Treaty with the Shawanoe, January 31, 1786 (7 Stat. 26).....	2,21,67
Ordinance of the Confederated Congress, July 7, 1787.....	2,22,67
Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's, Kickapoos, Piankeshaw's, and Kaskaskias, August 3, 1795 (7 Stat. 49).....	2,22,68
Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200).....	2,27,68
Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, July 22, 1814 (7 Stat. 118).....	2,23,69
Treaty with Great Britain December 24, 1814 (8 Stat. 218).....	2,24,69

Treaty with the Wyandotte, Seneca,
Delawares, Shawanese, Potawatomie,
Ottawas, and Chippewa, tribes of Indians,
on September 29, 1817 (7 Stat. 160)...3,25,70

Treaty with the Wyandot, Seneca, Shawanese,
Ottawas, Delaware, Potawatomees, and
Chippeway Tribes of Indians, September
17, 1818 (7 Stat. 178).....3,26,71

Treaty with the Osage, June 2, 1825
(7 Stat. 240).....3,28,71

Treaty with the Shawnee, November 7,
1825 (7 Stat. 284).....3,29,50,72

Treaty with the Shawnee, August 8,
1831 (7 Stat. 355).....3,4,31,40-45,73

Treaty with the Cherokee, December 29, 1835
(7 Stat. 478).....3,53,75

Treaty with the Shawnee dated May 10,
1854 (10 Stat. 1053)....3,4,33,34,36,41,43,76

Treaty with the Cherokee, July 19,
1866, (14 Stat. 799).....3,54,77

Agreement Between the Shawnee and
Cherokee, concluded June 7, 1869,
and approved by the President
June 9, 1869.....3,55,77

MISCELLANEOUS

Op. Sol. M27781, 55 l.D. 14, 50 (25 Oct. 1934).....	52
Opinion of Kansas Attorney General, No. 89-115.....	15, 16
Senate Report 97-107, 97th Congress, 3rd Session, at page 13015.....	52



Petitioner respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Supreme Court of the State of Kansas entered in this matter on April 23, 1990.

OPINIONS BELOW

The April 23, 1990 opinion of the Kansas Supreme Court, whose judgment is herein sought to be reviewed, is unreported and is reprinted in the separate Appendix to this Petition, page 68. The opinion of the District Court of Johnson County, Kansas is unreported and is reprinted in the separate Appendix to this Petition, page 66.

JURISDICTION

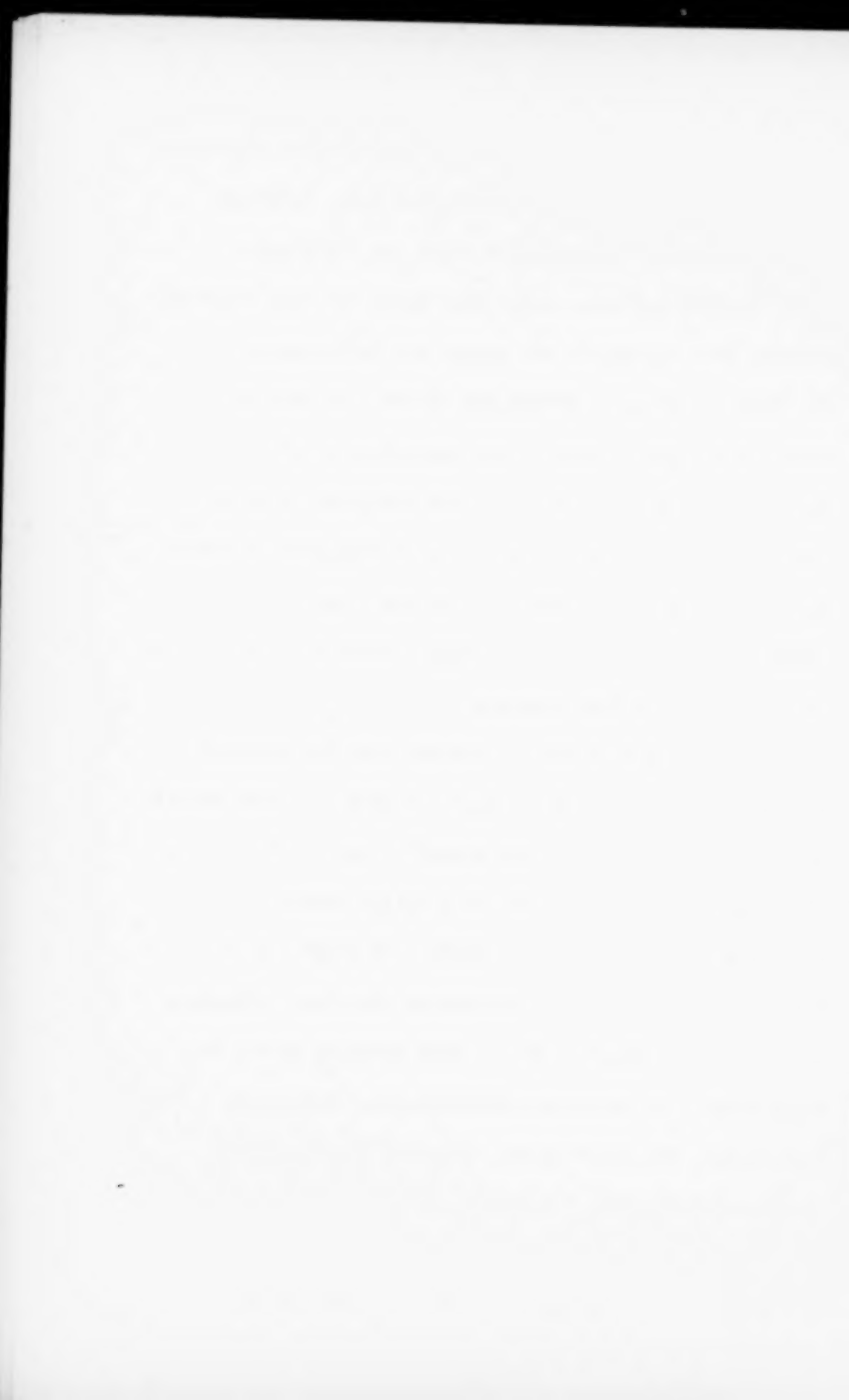
The judgement of the Supreme Court of the State of Kansas denying Petitioner's Writ of Prohibition and/or Mandamus was entered April 23, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED



This case involves the Supremacy Clause of the United States Constitution, Article VI, clause 2, which provides as follows:
This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also concerns the following Treaties. The Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200). The Treaty with Great Britain, December 24, 1814 (8 Stat. 218). The Treaty with the Shawanoe Nation, January 31, 1786 (7 Stat. 26). The Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wea's, Kickapoos, August 3, 1795, (7 Stat. 49). The Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis,



July 22, 1814, (7 Stat. 118). The Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Tribes, September 29, 1817 (7 Stat. 160). The Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Tribes, September 17, 1818 (7 Stat. 178). Treaty with the Osage, June 2, 1825 (7 Stat. 240). The Treaty with the Shawnee, November 7, 1825 (7 Stat. 284). The Act of Congress, Approved, May 28, 1830; C. 148 (4 Stat. 411). The Treaty with the Shawnee August 8, 1831 (7 Stat. 355). The Treaty with the Shawnee, May 10, 1854 (10 Stat. 1053). The 11th Section of the Act of Congress, approved 3rd of March, 1859, (U.S. Statutes, Vol. 11, page 430). The Treaty with the Cherokee Nation, December 29, 1835 (7 Stat. 478). The Treaty with the Cherokee Nation, July 19, 1866 (14 Stat. 799). The Agreement Between the Shawnees and the Cherokee, concluded June 7, 1869, Approved by the President June 9, 1869.



Statutes include: 18 U.S.C. section 1151, 25 U.S.C. section 1321, et seq., 18 U.S.C. section 3243, 28 U.S.C. section 1254(1), K.S.A. 79-3321(a) and K.S.A. 79-3321(n), The Constitution of the State of Kansas, Section 1, An Act to Organize the Territory of Kansas, (An Act of May 30, 1854, ch. 59, section 19, 10 Stat. 283) and An Act for the Admission of Kansas Into the Union (Act of January 29, 1861, ch. 20, section 1, 12 Stat. 126).

STATEMENT OF THE CASE

This is a criminal jurisdictional issue, whereby the State of Kansas has exercised criminal jurisdiction over Petitioner, an enrolled member of the Cherokee Nation, as a Loyal Shawnee, when Petitioner's business is located and operated within Indian Country on land owned by Petitioner in restricted status and under the jurisdiction of the Cherokee Nation. This parcel of land is commonly known as Shawnee Reserve No. 206 and is located within the bounds of the Shawnee reservation established pursuant to the

Treaties with the Shawnee, November 7, 1825 (7 Stat. 284) and August 8, 1831 (7 Stat. 355) and May 10, 1854 (10 Stat. 1053).

Sometime during 1986, Petitioner, aware that Indian Smokeshops were in operation in Oklahoma and Kansas, contacted his Tribe, the Cherokee Nation concerning tribal laws governing the operation of a smokeshop to be operated on Petitioner's restricted Indian land. The Petitioner also contacted other Tribal members, who had retail Smokeshops in operation in Oklahoma and other Indians operating smokeshops in Kansas regarding Kansas laws involved in the purchase and resale of unstamped and untaxed cigarettes.

The Cherokee Nation advised Petitioner in July of 1986, that the Cherokee Nation did not have a tobacco tax ordinance.

Petitioner was informed by tribal members of the Cherokee Nation in Oklahoma that there was no tribal tax. The Indians in Kansas and tribal members in Oklahoma informed Petitioner that the State of Kansas,

Department of Revenue allowed them to purchase tax exempt cigarettes and of the process necessary to purchase tax exempt cigarettes from wholesalers in Kansas.

On May 29, 1987 the Petitioner and Mr. Roger Yarbrow, of the F. S. Edwards Tobacco Company, contacted the Kansas Department of Revenue concerning the requirements necessary to purchase tax exempt cigarettes.

On May 29, 1987, Ms. Hazel Smith of the Kansas Department of Revenue, informed the Petitioner and Mr. Yarbrow, that there was only one requirement for Petitioner to purchase tax free cigarettes for resale. That was, the Department of Revenue required a copy of Petitioner's Indian land tax exempt record, as maintained by the Johnson County Register of Deeds/Treasurer at the Johnson County Courthouse, be forwarded to the Department of Revenue and kept on file at their offices in Topeka.

A copy of the tax exempt record was forwarded to the Kansas Department of Revenue on May 31, 1987. A copy of the tax exempt

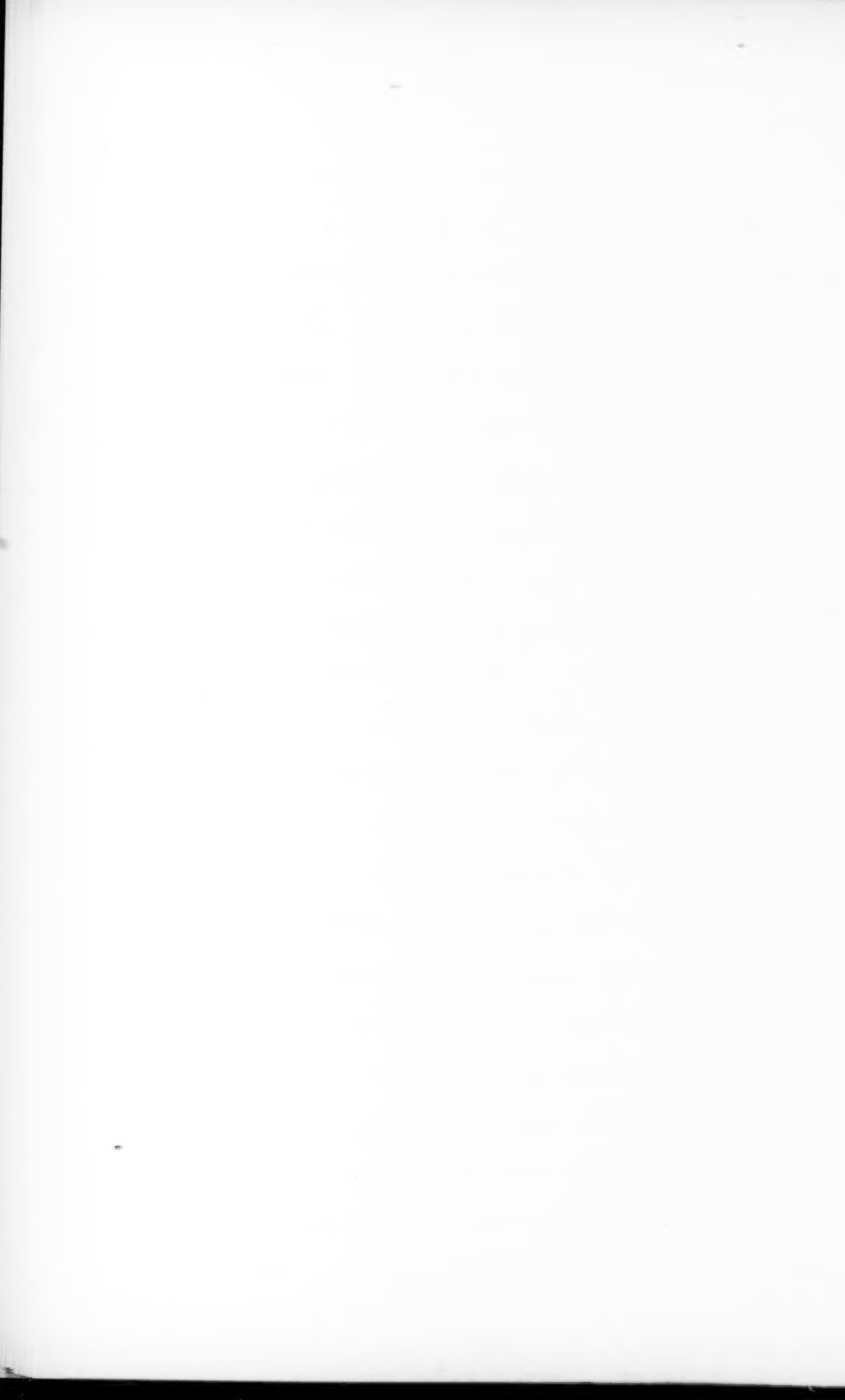
record was also forwarded to Mr. Roger Yarbrow.

On June 18, 1987, Ms. Peggy F. Acoya, Superintendent, Horton Agency, Bureau of Indian Affairs, Horton Kansas, at the request of Mr. D. Philip Wilkes, Kansas Department of Revenue sent him a letter in which Ms. Acoya informed Mr. Wilkes that the title to Petitioner's land was held in restricted status and that the state had no right to trespass without the owner's consent.

On June 21, 1987, Petitioner contacted the Kansas Attorney General, requesting his assistance in obtaining a permit from the Department of Revenue to purchase tax free cigarettes for his Smokeshop. Petitioner informed the Attorney General that if a permit was not issued by the Kansas Department of Revenue, Petitioner would be forced to buy cigarettes from an out-of-state cigarette wholesaler. Petitioner also notified the Attorney General of his tribal membership number and that his Tribe, the Cherokee Nation was a federally recognized

Tribe.

On July 8, 1987, Petitioner received a letter from D. Philip Wilkes, an attorney with the Kansas Department of Revenue, which stated:....We are unable to grant your request to purchase tax free cigarettes...based on recent United States Supreme Court decisions... Washington v. Confederated Tribes of the Coleville Indian Reservation, 447 U.S. 134 (1980),... California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S.-----, 88 L. Ed. 2nd 9, 106 S, Ct. (1985) ...In your situation, none of the elements are present which support an exemption from state cigarette tax. The land is neither reservation land nor under the control of any Indian tribal government. No Indian tribe has asserted the right to tax or otherwise regulate cigarette sales made to its tribal members on the land. Therefore, it seems apparent that all sales of cigarettes on that land would be subject to the Kansas cigarette tax. Consequently, we are unable to grant your request... copy to



Attorney General...

On July 16, 1987, Petitioner received a letter from the Office of the Kansas Attorney General informing him that he did not qualify to receive untaxed cigarettes due to the Department of Revenue's ruling.

Sufficient information and facts were furnished to the Kansas Department of Revenue by the Bureau of Indian Affairs which should have allowed them to issue a permit to Petitioner to purchase untaxed cigarettes.

On March 7, 1988, Senate Bill No. 720 was introduced in the Kansas Legislature.

On March 31, 1988, Petitioner, opened his Smokeshop business, on his restricted Indian land, under the name Shawnee Jim's, Indian Country Smokeshop. Petitioner sold untaxed and unstamped cigarettes to members of his own tribe, other Indians and non-Indians. Petitioner did not charge Kansas State sales tax on any item sold or pay Kansas State cigarette tax on the cigarettes sold.

Senate Bill No. 720 was signed into law by Governor Hayden on May 17, 1988. This Bill amended K.S.A. 79-3321 as follows:

...It shall be unlawful for any person: (a) To possess, except as otherwise specifically provided by the act, more than 200 cigarettes without the required tax indicia being affixed as herein provided...(h) To wholesale cigarettes to any person, other than a manufacturer's salesman, retail dealer or wholesaler who is: (1) duly licensed by the state where such manufacturer's salesperson, retail dealer or wholesaler is located, or (2) exempt from state licensing under applicable state or federal or court decisions including any such person operating as a retail dealer upon land allotted to or held in trust for an Indian tribe recognized by the United States Bureau of Indian Affairs...

On June 8, 1988, Petitioner received a Notice, dated June 6, 1988 from the Kansas Department of Revenue regarding the Department's interpretation of Senate Bill



No. 720. Pertinent parts of the Notice are as follows:...IN-STATE SALES...The amendments to K.S.A. 79-3321 by Senate Bill 720 will not affect sales made within the state of Kansas. The following factors must be present in order for cigarette sales to Indians made within the state of Kansas to qualify for an exemption:...1. The sales must take place upon land which is recognized as a reservation by the Bureau of Indian Affairs. The land must be owned by the Indian tribe or by the U.S. Government in trust for the Indian tribe. The land must be under the control of an Indian tribe recognized by the Bureau of Indian Affairs;...2. The sales must be made by the tribe itself or by a retailer approved by the tribe under regulations or ordinances adopted by the tribal government pursuant to its constitution. The person or persons actually operating the retail business do not have to be a member of that tribe or even an Indian; and 3. The sales must be made only to members of the same tribe as the one which



controls the reservation and regulates the retailer. Sales made to non-Indians or members of other Indian tribes are not exempt from Kansas cigarette tax...

After Senate Bill 720 became law, and Petitioner received the Notice, dated June 6, 1988 from the Department of Revenue, Petitioner received a letter, dated August 19, 1988, from Mr. John R. Luttjohann, Director of Taxation, Kansas Department of Revenue. The letter directed the Petitioner to cease and desist selling tax free cigarettes for the following reasons:...The Kansas Department of Revenue has repeatedly denied your request to sell untaxed cigarettes. You do not satisfy those criteria necessary for selling untaxed cigarettes. To be exempt as an Indian retailer the following criteria must be satisfied:...1. The land upon which the sales are made must be Indian Land and be under the control of an Indian tribe recognized by the Bureau of Indian Affairs. 2. The cigarette sales must be made by the tribe itself or by



a retailer approved by the tribe under regulations or ordinances adopted by the tribal government pursuant to its constitution. 3. The cigarettes sales must be made only to members of the same tribe as the one which controls the reservation and regulates the retailer; sales made to non-Indians or members of other Indian tribes are not exempt from state cigarette tax. See Washington v. Confederated Tribes of the Coleville Indian Reservation, 447 U.S. 134 (1980)...You are hereby ordered to cease and desist from selling unstamped cigarettes in the State of Kansas. If this notice is ignored and you continue to violate the provisions of the Kansas Cigarette and Tobacco Products Act, the Department will be required to take further action to enjoin your unlawful cigarette operation.

On April 11, 1989, Petitioner received a letter from Paul J. Morrison, District Attorney, Johnson County, Kansas which threatened Petitioner with prosecution if he did not stop selling untaxed, unstamped



cigarettes. Petitioner met with the District Attorney and an attorney from the Department of Revenue. Petitioner subsequently sent Mr. Morrison a memorandum of law and heard nothing further until his arrest on January 23, 1990.

On June 23, 1989, Mr. Mark A. Burghart, General Counsel, Kansas Department of Revenue, sent a letter to Mr. Lance Burr, Attorney at Law, Lawrence, Kansas, an attorney for the Four Tribes of Northeast Kansas. This letter stated in pertinent part:...Pursuant to our meeting of June 23, 1989, this letter sets forth the Kansas Department of Revenue's policy on the jurisdiction question regarding the Prairie Band Potawatami Nation, the Sac & Fox Nation, the Kickapoo Nation and the Iowa Nation of Kansas and Nebraska. Presently, it is the Department of Revenue's position that the State of Kansas does not have civil jurisdiction over "federally recognized Indian Reservations" located within the boundaries of the State of Kansas. Due to



the fact that the above mentioned Indian Nations are located within the boundaries of a federally recognized Indian Reservation, the Kansas Department of Revenue can not require these Indian Nations to collect and remit excise taxes to the State of Kansas....Specifically, the Potawatami, Sac & Fox, Kickapoo, and the Iowa Nations are not required to collect state sales tax, motor fuel tax or cigarette tax at their respective smokeshops as long as the smokeshops are located within the boundaries of these federally recognized Indian reservations...If you have any further questions, please contact Melanie Caro...

On September 12, 1989, the Kansas Attorney General at the request of Mr. Mark A. Burghart, General Counsel, Kansas Department of Revenue, issued Opinion No. 89-115. In this Opinion, the Attorney General stated:...You state that your request is strictly limited to on-reservation activity and does not encompass the situation where an Indian retailer is operating on



other than a federally recognized reservation...

...Re: Taxation-- Kansas Retailers' Sales Tax-- Jurisdiction to enforce Provisions on Federally Recognized Indian Reservations.

Synopsis: Indian retailers operating on federally recognized reservation selling products which have been imported for sale are subject to the "collect and remit" requirements of the State's retailers' sales tax and cigarette tax act when the legal incidence of the tax falls on non-Indian purchasers. Through enforcement may be difficult in that we do not believe action to enforce may be brought in state courts, the absence of civil jurisdiction under Public Law 280 and 25 U.S.C. 1322(a) does not preclude the State from requiring collection. Cited herein K.S.A. 79-3302; K.S.A. 1988 Supp. 79-3310; 79-3321; 79-3408; K.S.A. 79-3409; K.S.A. 1988 Supp. 79-3604; 18 U.S.C. 1343; 25 U.S.C. 1322; 28 U.S.C. 1360...



Upon information and belief the Department of Revenue has, from mid-1986 to the present, continued to allow Kansas cigarette wholesalers to sell tax free cigarettes to individual members of Petitioner's tribe, the Cherokee Nation, in the State of Oklahoma and to other Indians in the State of Kansas, while prosecuting Petitioner for selling untaxed and unstamped cigarettes.

On January 23, 1990, pursuant to a warrant issued by the Johnson County District Court, officers of the Kansas Bureau of Investigation, the Johnson County Sheriff's office and members of the Kansas Department of Revenue, trespassed onto Shawnee Reserve 206, arrested Petitioner and confiscated Petitioner's cigarettes. Petitioner was charged with six misdemeanor offenses under Kansas State law. Namely, three violations of K.S.A. 79-3321(n) (unlawfully and willfully selling cigarettes at retail that did not bear Kansas tax indicia or upon which the Kansas Cigarette Tax has not been paid)



and three violations of K.S.A. 79-3321(a) (unlawfully and willfully possessing more than 200 cigarettes without the required tax indicia being affixed.)

On February 22, 1990, Petitioner filed a Motion to Dismiss based upon the fact that the State of Kansas and its Courts lacked criminal jurisdiction to prosecute the Petitioner. The motion was based on the treaties with the Shawnees, the Kansas Acts and general principles of Federal Indian law. A subsequent Amended Motion to Dismiss was filed, based upon the fact that Kansas lacked jurisdiction pursuant to 18 U.S.C. section 3243. Both motions were denied by the Court on March 5, 1990 without opinion. The case was set for trial for April 3, 1990. On March 22, 1990, Petitioner filed a Writ of Prohibition and/or Mandamus in the Kansas Supreme Court. The Writ challenged the jurisdiction of the District Court of Johnson County to prosecute the Petitioner, on the bases of the Treaties with the Shawnee and other Indian Tribes, the Kansas Organic Act,



the Kansas Constitution, the Kansas Enabling Act, the status of Petitioner's restricted Indian land, Petitioner's membership in the Cherokee Nation as a Loyal Shawnee, and general principles of Federal Indian Law.

The Writ of Mandamus and/or Prohibition was denied by the Kansas Supreme Court on April 23, 1990 without a formal decision being rendered by the Court. Petitioner was tried and convicted of the above-mentioned offenses on April 3, 1990. Petitioner was sentenced to the custody of the Sheriff of Johnson County, Kansas for a period of 180 days and fined the amount of \$250.00 for the three (3) violations of selling unstamped cigarettes and fined the amount of \$500.00 for three (3) violations of possessing more than 200 cigarettes with no Kansas stamp.

The case is presently on appeal to the Kansas Court of Appeals.



REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because the Kansas Supreme Court has decided the Treaty Issue in a way that Conflicts with Applicable Decisions of this Court namely, that Treaties are the Supreme Law of the Land.

The Kansas Supreme Court has determined by its refusal to grant the Writ of Prohibition and/or Mandamus that the State of Kansas has criminal jurisdiction and the authority to trespass, (See Ronnie Ross v. Russell Neff, ____ F.2d ____ (10th Cir. 1990)), by the use of force and arms, into and upon Indian Country, confiscate Indian property, control Indian trade by taxation and subject Petitioner, a member of the Cherokee Nation, to Kansas State criminal laws.

The promises contained in the Treaties with the Shawnee, other Indian Nations and with other Countries, the Kansas Organic Act, the Kansas Constitution and the Kansas Enabling Act, and the Supremacy Clause of the

United States Constitution, Art. VI, cl. 2, preclude the State of Kansas from exercising criminal jurisdiction over the Petitioner.

During the early 1700's members of the Shawnee Nation were generally located in the area now known as the Ohio Valley.

On January 31, 1786, the United States and the Shawanoe Nation entered into a Treaty, (7 Stat. 26). Article II, contained the following:

... The Shawanoe Nation do acknowledge the United States to be the sole and absolute sovereigns of the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the 14 day of January, one thousand seven hundred and eighty-four...

Article V, contained the following:

...The United States do grant peace to the Shawanoe Nation, and do receive them into their friendship and protection...

Article VII, contained the following concerning citizens of the United States:

...If any citizen or citizens of the United States, shall presume to settle upon the land



allotted to the Shawanoes by this treaty, he or they shall be put out of the protection of the United States...

On July 7, 1787, the Confederated Congress published an Ordinance for the government of the territory of the United States northwest of the river Ohio. Article III contained the following:

... The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws found in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them...

On August 3, 1795, the United States entered a Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's,



Kickapoos, Piankeshaw's, and Kaskaskias, (7 Stat. 49). Article IV, contained the following concerning annual annuities:
...The Tribes to which those goods are to be annually delivered, and the proportions ...
To the Shawanese, the amount of one thousand dollars...

Article V, contained the following about the United States protection:
... And the said tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever...

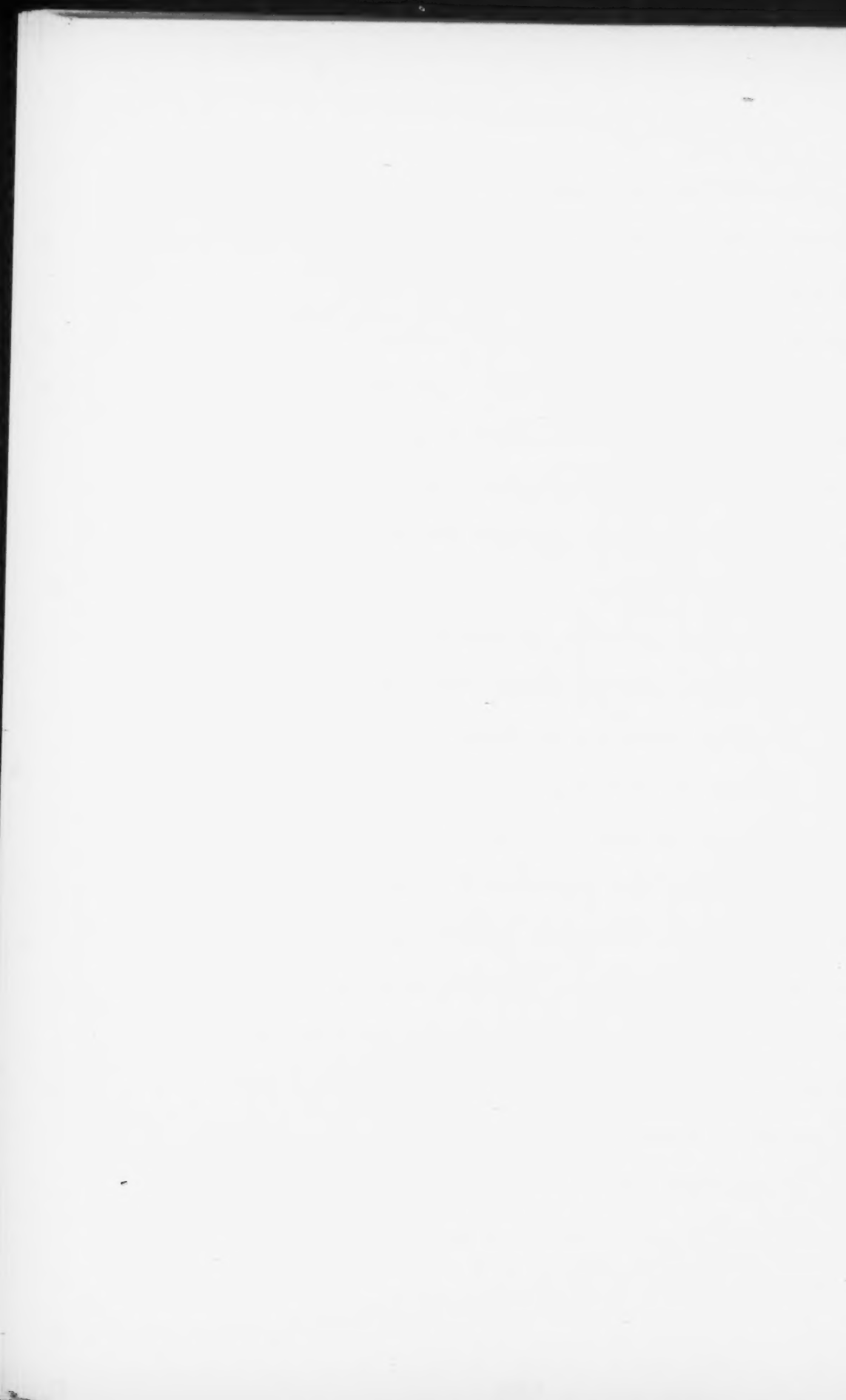
On July 22, 1814, the United States entered into a Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, (7 Stat. 118). Article II, contained the following:
...The tribes or bands above mentioned engage to give their aid to the United States in prosecuting the war against Great Britain....
Article III, contained the following acknowledgment:
...who have preserved their fidelity to the



United States throughout the war, again acknowledge themselves under the protection of said states, and no other power whatever:...

On December 24, 1814, the United States entered into a Treaty with Great Britain, (8 Stat. 218). The Ninth Article concerning the ratification of the Indian treaties and is stated as follows:

...The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indian with whom they may be at war at the time of such ratification; and forthwith whom they may be at war at time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities;... Provided always... Provided always...



By 1817, the Shawnee Nation as well as other Tribes were located upon lands that by now had become part of the State of Ohio.

The United States entered into a Treaty with the Wyandotte, Seneca, Delawares, Shawanese, Potawatomie, Ottawas, and Chippewa, tribes of Indians, on September 29, 1817 (7 Stat. 160). Article 15 of the Treaty stated as follows:

...The tracks of land herein granted to the Chiefs, for the use of the Wyandotte, Shawnees, Seneca, and Delaware Indians, and the reserve for the Ottawa Indians, shall not be liable to taxes of any kind so long as such land continues the property of said Indians...

Attached to the Treaty was a "Schedule". The Schedule contained the following name, concerning the division of the track of Shawnee land, ten miles square, located at Wapaghkonetta - Thakoska or David M'Nair - believed by elder members of Petitioner's family to be the father of Newton McNeer, the original owner of Shawnee



Reserve 206.

By 1817, the encroachment of non-Indians, led to the demand for the extinguishment of Indian title to Indian lands located within the State of Ohio. This demand resulted in a supplementary Treaty to the Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Tribes of Indians, dated September 29, 1817 (7 Stat. 160). The supplementary Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, was signed on September 17, 1818 (7 Stat. 178).

Article 1, of the September 17, 1818 (7 Stat. 178), Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, reads as follows:

... It is agreed, between the United States and the parties hereunto, that the several tracts of land, described in the treaty to



which this is supplementary, and agreed thereby to be granted by the United States to the Chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the twentieth article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the use of said Indians, and held by them in the same manner as Indian reservations have been heretofore held...

In 1803 the United States had entered into a Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200).

"The Louisiana Purchase" doubled the size of the United States. Article VI, of subject treaty contained the following:

...The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations,



other suitable articles shall have been agreed upon...

Due to the continuing migration of non-Indians to the State of Ohio, the Shawnee Nation, by 1825, consisted of two Tribes. One tribe was located in the State of Ohio and the other tribe was located in the Spanish possession called the Louisiana Purchase. The Shawnee Tribe that was located in the Louisiana Purchase was referred to as the "Missouri Shawnee." The Shawnee Tribe that was located in the State of Ohio was referred to as the "Ohio Shawnee." By 1825 it was the policy of the United States to remove the Indians located East of the Mississippi river to territories West of the Mississippi river.

In 1825, the United States entered into a treaty, Treaty with the Osage, June 2, 1825 (7 Stat. 240). This treaty provided the land, that had been part of "The Louisiana Purchase", that was to be given to the Shawnee pursuant to the 1825 Treaty with the

Shawnee.

In 1825 the United States and the Missouri Shawnee entered into a treaty. Treaty with the Shawnee, November 7, 1825 (7 Stat. 284). The Missouri Shawnee were in the possession of and located on a track of land settled with the permission of the Spanish Government 4 January, 1793. Article 2 of subject treaty stated:

... in consideration of the cessions aforesaid, The United States do, hereby, agree to give to the Shawnee Tribe of Indians, within the State of Missouri for themselves and for those of the same nation, now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to fifty (50) miles square, situated west of the State of Missouri, and within the purchase lately made from the Osage, by treaty bearing date the second day of June, one thousand eight hundred and twenty five,...

On May 28, 1830 the Congress of the United States, passed an Act (4 Stat. at L.

p. 411, chap. 148) whereby the President of the United States was directed to select a country west of the Mississippi, to remove and settle the Indians upon.

Section 3 of the Act provided as follows:

...That in making any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same...

Section 7 of the Act provided as follows:

...That it shall and may be lawful for the President to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act, that he is now



authorized to have over them at present place of residence: Provided, That nothing in the act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any Indian tribes...

In 1831 the United States government and the Ohio Shawnee entered into a treaty.

Treaty with the Shawnee, August 8, 1831 (7 Stat. 355), under the authority of the Act of Congress, Sess. 1, Ch. 148 approved May 28, 1830. The beginning of the treaty reads as follows:

...Whereas the President of the United States under the authority of the Act of Congress, approved May 28, 1830, has appointed a special commissioner to confer with the different Indian tribes residing within the constitutional limits of the State of Ohio, and to offer for their acceptance the provisions of the before recited act: And Whereas the tribe or band of Shawnee Indians ... assent to the conditions of said act, ... in order to obtain a more permanent and

advantageous home for themselves and their posterity ... which, when ratified by the President of the United States, by and with the advice and consent of the Senate thereof, shall be mutually binding upon the United States and the said Shawnee Indians...

Pursuant to this Treaty the Shawnee Tribe promised to relinquish their lands located in the State of Ohio for:

... a tract of land to contain one hundred thousand acres, to be located under the direction of the President of the United States, within the track of land equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri...

In Article X, the United States government promised and guaranteed that:
...The lands granted by this agreement and convention to the said band or tribe of Shawnee, shall not be sold or ceded by them, except to the United States. And the United States guarantee that the said lands shall never be within the bounds of any State or

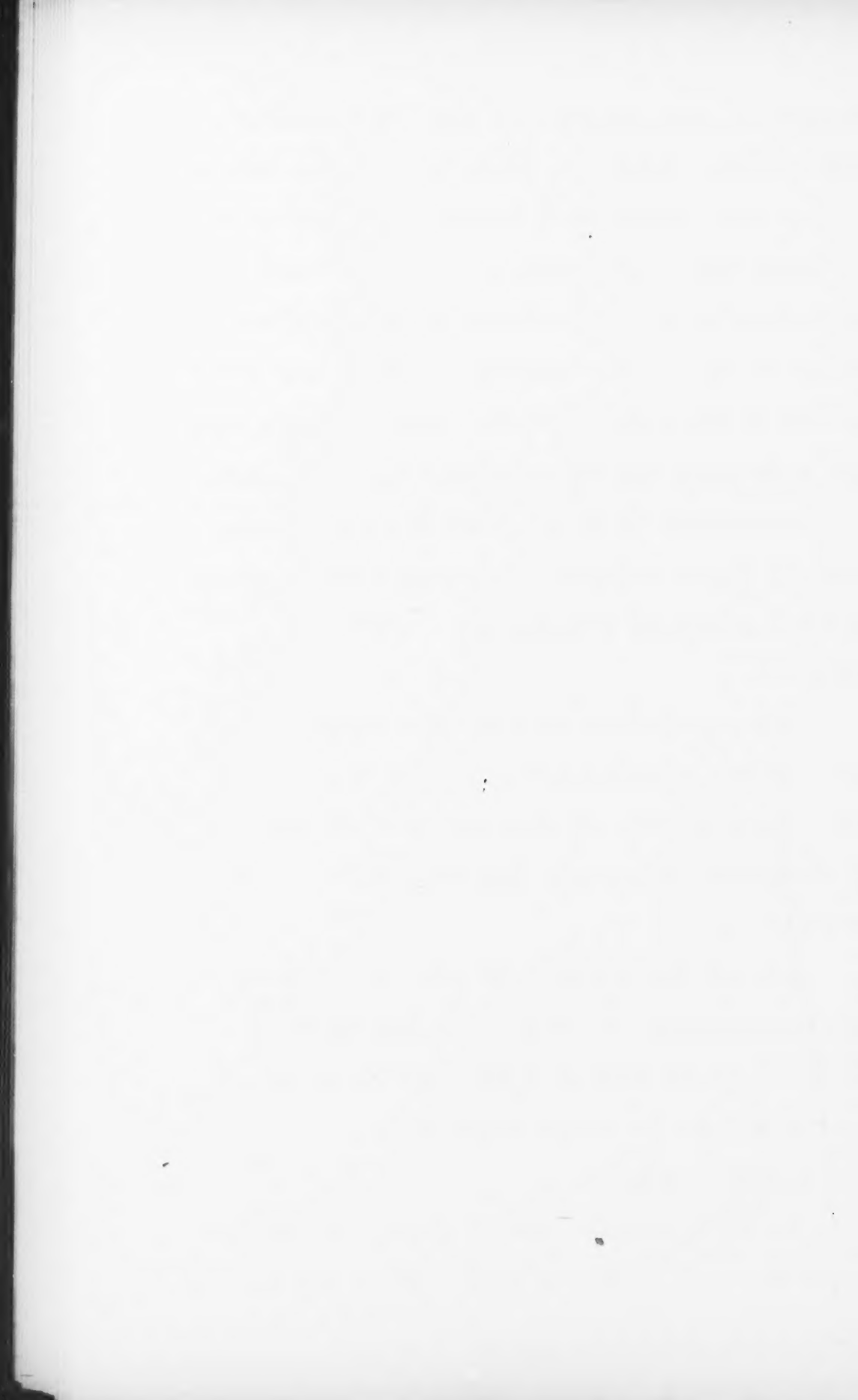


Territory, nor subject to the laws thereof:
and further, that the President of the United States will cause said tribe to be protected at their intended residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever, and he shall have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence... (emphasis added.)

The provisions of the 1831 Treaty with the Shawnee carried all previous Treaty Articles forward, as provided for by the Act of Congress, Approved, May 28, 1830; C. 148 (4 Stat. 411).

One of the signers of the 1831 Treaty was Peaghtucker, or McNear by his mark, believed to be Newton McNeer or an uncle of Newton McNeer by elder members of Petitioner's family.

In 1854 another Treaty with the Shawnee dated May 10, 1854 (10 Stat. 1053) was signed



between the Shawnee Indians and the United States. In this Treaty provision was made for the issuing of allotments. The 1854 Treaty with the Shawnee established a 200,000 acres reservation, but did not remove Shawnee Tribal jurisdiction from the original 1.6 million acre reservation established by the 1825 and 1831 treaties. The jurisdiction over the total 1.6 million acres is assured by Article 2 of subject treaty which allowed the following:

...All the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundreds thousand acres reserved by the Shawnee...

Article 2 of the May 10, 1854 Treaty with the Shawnee allowed land located within the Reservation to be allotted to individual members of the Tribe or held in common by Tribal members as follows:



... if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family ... In the settlement known as Black Bob's settlement, in which he has an improvement, whereon he resides; and in that known as Long Tail's settlement, in which he has improvement whereon he resides, there are a number of Shawnee who desire to hold their land in common;...

Article 9 of the 1854 Treaty with the Shawnee, also provided:

... Congress may hereafter provide for the issuing, to such of the Shawnee as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein.

The United States Congress provided for the issuing of patents, by the 11th Section of the Act of Congress, approved 3rd of March, 1859, (U.S. Statutes, Vol. 11, page 430).

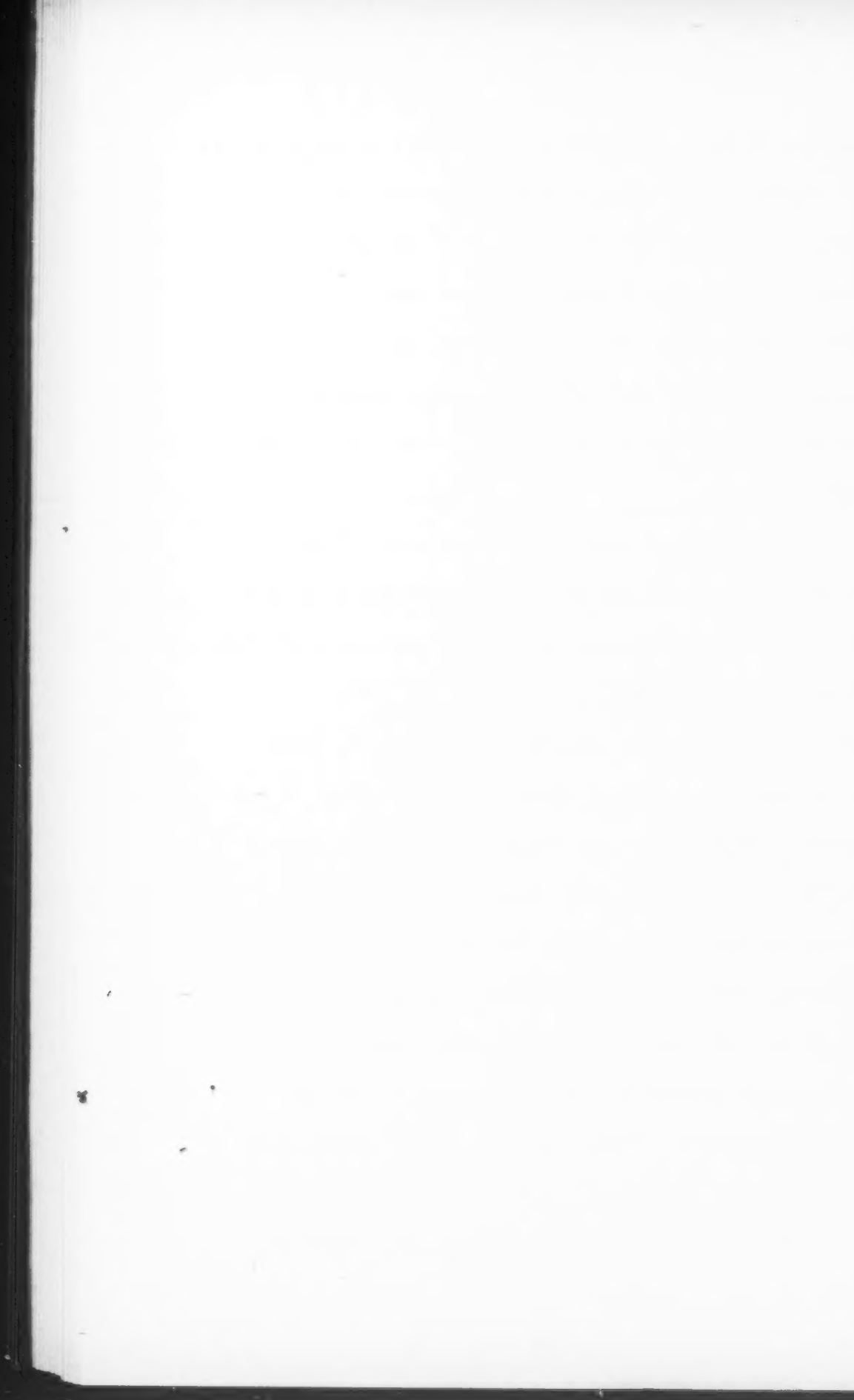
Shawnee Reserve 206 is a restricted patent allotment issued to Shawnee Indian,



Newton McNeer the head of a family consisting of himself and Nancy McNeer under the provisions of the 2nd and 9th Articles of the Treaty with the Shawnee dated May 10, 1854 and pursuant to the provision of the 11th Section of the Act of Congress, approved 3rd March, 1859; (U.S. Statutes, Vol. 11. page 430).

Newton and Nancy McNeer, were the original owners of Shawnee Reserve 206 and were Shawnee Indians who were members of the Shawnee Nation as it existed in 1854. Petitioner, Loyal Shawnee, Jimmie D. Oyler, is a continuing and enduring agent of the Shawnee Nation as it existed in 1854, as a lineal descendant and heirs of Newton and Nancy McNeer, and owns an interest in Shawnee Reserve 206, in restricted status. Shawnee Reserve 206, has remained with the Indian heirs and descendents of Shawnee Indian, Newton McNeer, from the date the allotment was issued.

Article 14, acknowledged the Shawnee



dependence on the United States Government as follows:

...The Shawnee acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with laws in such cases made and provided, as they will expect to be protected, and have their rights vindicated...

The Act to Organize the Territory of Kansas (Act of May 30, 1854, ch. 59, section 19, 10 Stat. 283) was passed May 30, 1854.

The 1854 Treaty with the Shawnee took effect August 4, 1854. The jurisdiction of the territory created by the Kansas organic Act, as to the rights of Indians within subject territory was not to extend to the Indians, their rights of person or property, "so long as such rights should remain unextinguished by treaty with them". Section 19, of the Organic Act is quoted as follows: ...That nothing in this act contained shall be construed to impair the rights of persons



or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with any Indian tribe is now, without the consent of said Tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Kansas, until such tribe shall signify their assent to the President of the United States to be included within the said Territory of Kansas...

On July 29, 1859, a Constitution for the State of Kansas was formed. Section I of the Constitution provides that:

...That all rights of individuals should continue as if no state had been formed or change in government made...

In January 29, 1861, an Act for the Admission of Kansas Into the Union (Act of January 29, 1861, ch. 20, section 1, 12 Stat.

126) was passed by the Congress of the United States. Section I of the Act for Admission is identical to Section 19 of the Kansas Organic Act and reads as follows:

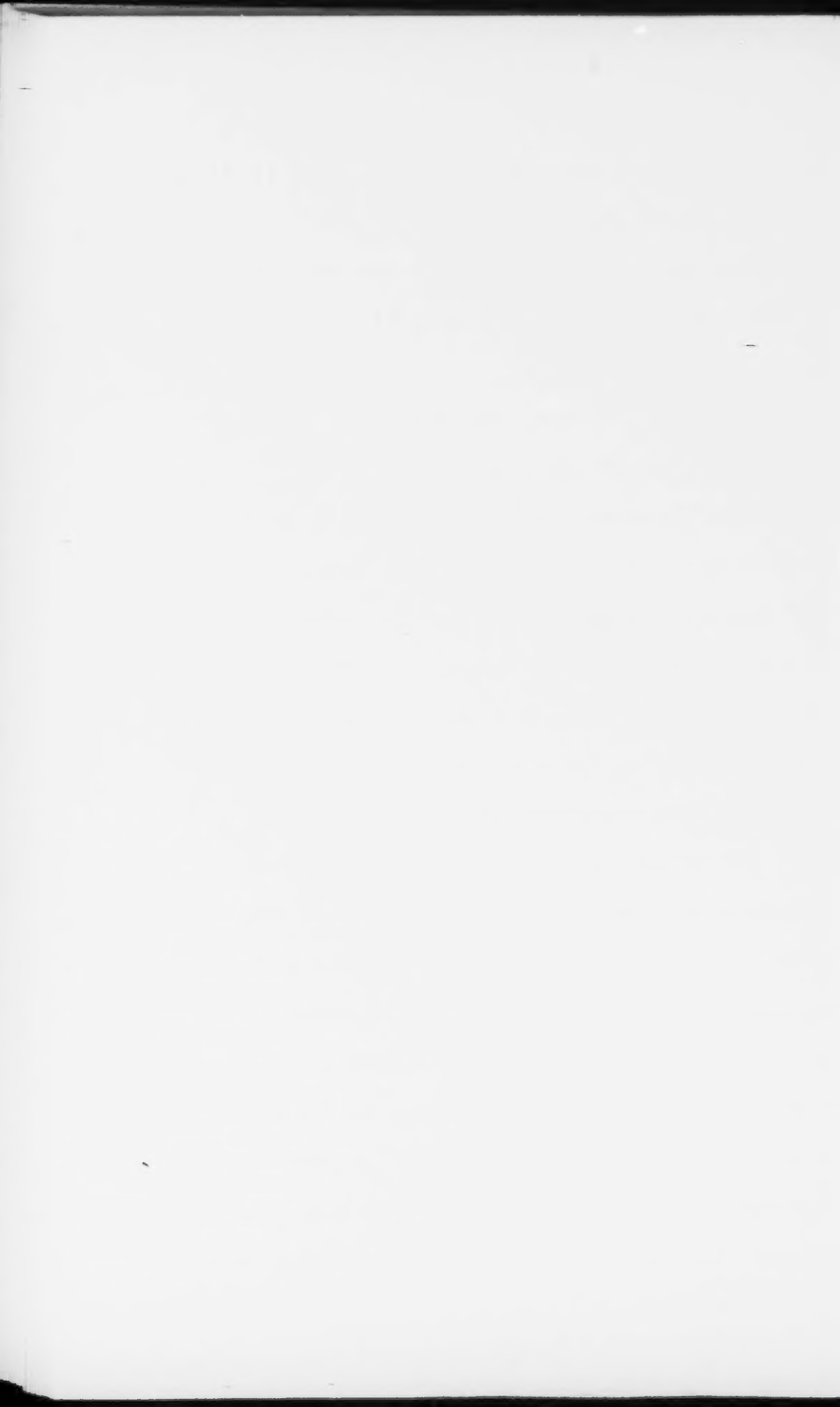
...That nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indian tribe, is not, without the consent of such tribe, to be included within the territory limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said state, or to, affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which

it would have been competent to make if this act had never passed...

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides as follows:

...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...

The President of the United States, pursuant to the Act of Congress, May 28, 1830, in 1831 entered into a Treaty with the Shawnee. The Treaty with the Shawnee, August 8, 1831, (7 Stat. 355), was based upon the conditions of said Act and was to be mutually binding upon the United States as well as the Shawnee. In Article X of the Treaty, the United States government promised that the



lands in Kansas given to the Tribe "shall never be within the bounds of any state or territory, nor subject to the laws thereof." Treaty with the Shawnees, August 8, 1831 (7 Stat. 355).

In 1854 another Treaty was signed with the Shawnees. This Treaty provided for the allotment of Shawnee lands, but did not modify, abrogate or otherwise nullify Article X of the 1831 Treaty or provisions of the Act of May 28, 1830.

The meaning of Article X is clear and unambiguous. It is specifically stated that the Shawnees shall never be within the bounds of any state nor subject to its laws, and therefore the cigarette taxation laws of the State of Kansas do not apply to the Petitioner.

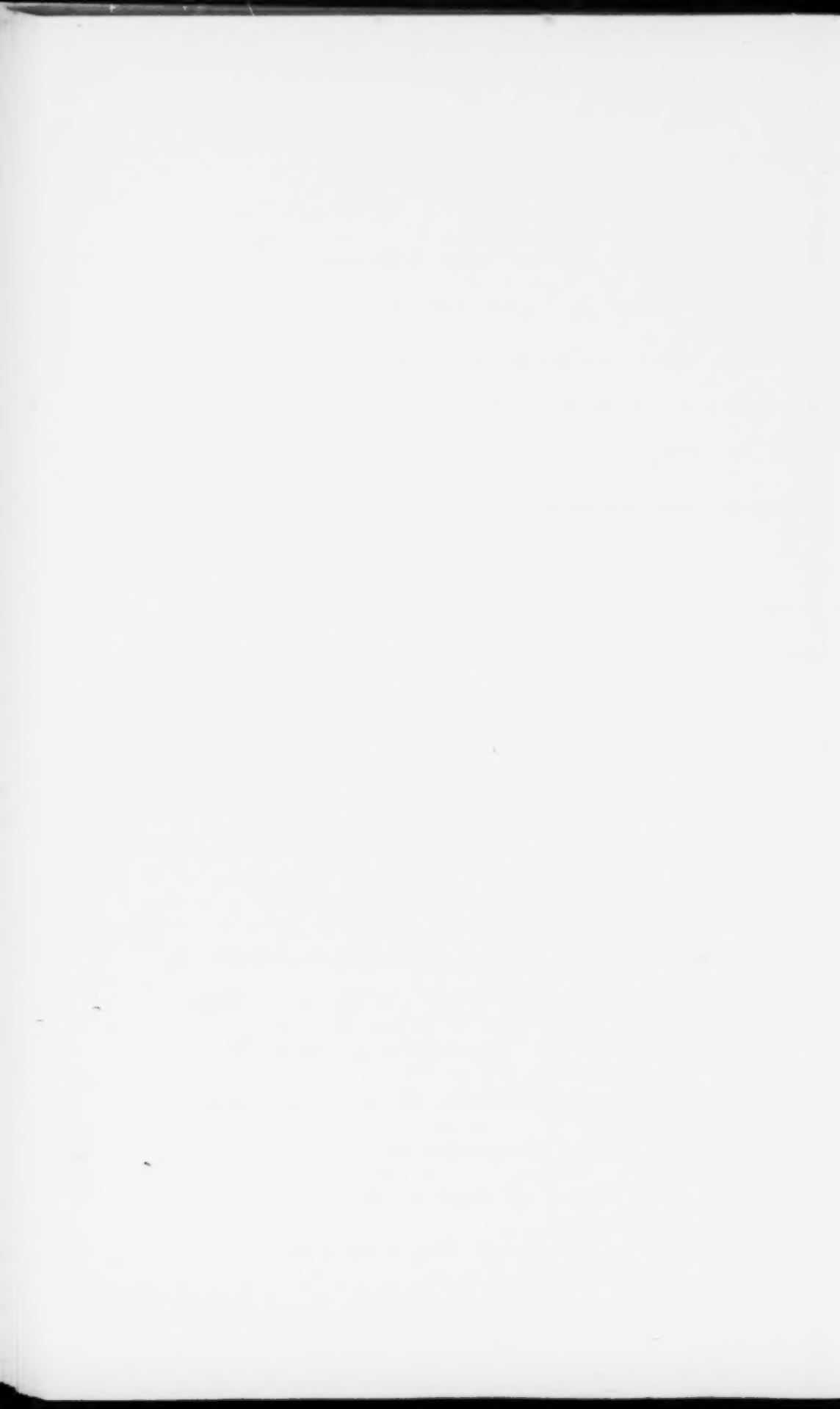
Over the years, this Court and lower Federal Courts have developed canons of construction to determine the existence or non-existence of treaty rights, the interpretation of treaty rights and whether or not a treaty has been abrogated by

Congress.

First, "rights secured by Treaty will not be deemed to have been abrogated or modified absent a clear expression of congressional purpose for the intention to abrogate or modify a Treaty is not to be lightly imputed to Congress." Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); E.E.O.C. v. Cherokee Nation, 871 F.2d 939 (10th Cir. 1989).

The second canon of construction holds that treaties are to be read in the sense in which the Indians understood them, and the language used in treaties should never be construed to the Indians' prejudice. Absentee Shawnee Tribe of Indians v. State of Kansas, 862 F.2d 1415, 1418 (10th Cir. 1988).

The language of Article X of the 1831 Treaty and the other treaties is clear and to construe the plain language of the Treaties against Petitioner, as the Kansas Supreme Court has done, violates the canon of



construction as set forth above.

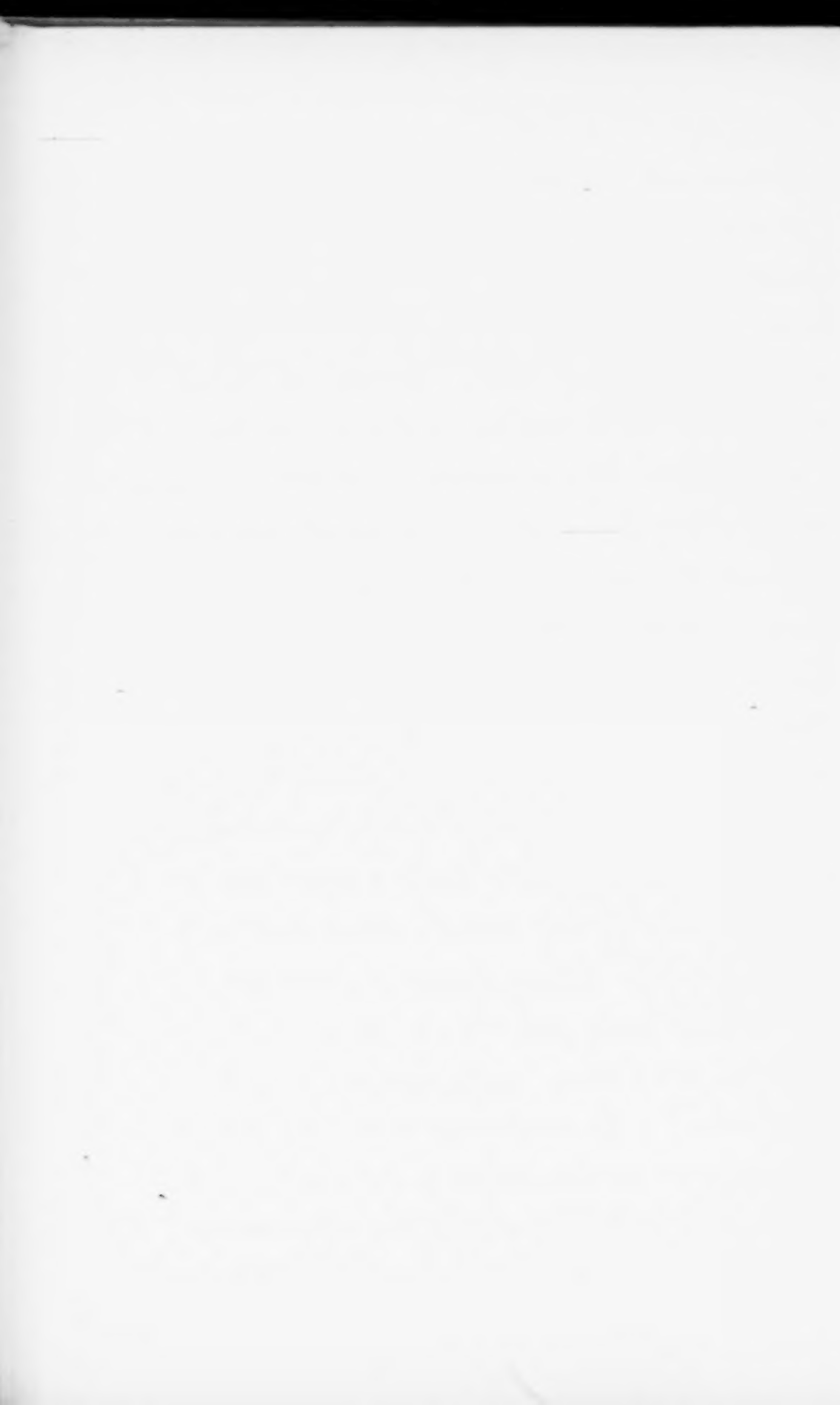
The Treaties have never been abrogated by Congress and are therefore the Supreme Law of the land. The State of Kansas has no criminal jurisdiction over the Petitioner.

The only existing case interpreting the 1825, 1831, and 1854 treaties with the Shawnee and associated Acts of the United States Congress and pertaining to Petitioner's land is The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737, (1867). In that case the issue facing the Court was whether the lands belonging to the Shawnee with separate estates were taxable. In deciding the issue, this Court was required to thoroughly analyze the numerous Indian treaties including the 1825, 1831 and 1854 Treaties with the Shawnee, and Acts of the United States Congress. The Court held that Johnson County could not tax these lands. The Court based its decision on the 1825, 1831 and 1854 Treaties, the Act of Congress, May 28, 1830, the Kansas Act for



Admission and the Kansas Organic Act. By disclaiming all jurisdiction over the Indians, their lands and property, Kansas had forfeited any right it might otherwise have had to tax Shawnee lands. Indeed, in dicta, the Court went so far as to state that the Shawnee lands were withdrawn from the operation of state laws. The Kansas Indians, at pages 756 and 757. (See also, Pennock v. Board of County Commissioners of Franklin County, 103 U.S. 367 (1881)).

The power to tax is a matter that is generally within the exclusive power of a state. However, when this power is preempted by a treaty, as in this case, a state may not enact or enforce any statute which conflicts with a treaty. United States v. Michigan, 471 F. Supp. 192, 265-266 (D. Mich. 1979), 653 F.2d 277 (1980), cert. denied 454 U.S. 1124 (1981). The cigarette taxation laws of the State of Kansas conflict with Article X of the 1831 Treaty and with the articles of the other Treaties with the Shawnee and the



Act of Congress, the Kansas Organic Act, the Kansas Constitution and the Kansas Enabling Act. Therefore the Kansas cigarette taxation laws are preempted by the Treaties and do not apply to Petitioner.

Article X of the 1831 Treaty and the provisions of the other Treaties cited *infra*, the Kansas Organic Act, the Kansas Constitution and the Kansas Enabling Act preempt any exercise of criminal jurisdiction by the State of Kansas over Petitioner.

The State of Kansas has contended throughout these proceedings that certain United States Supreme Court decision, cited below, vest criminal jurisdiction in the District Court of Johnson County. This, despite Article X of the 1831 Treaty.

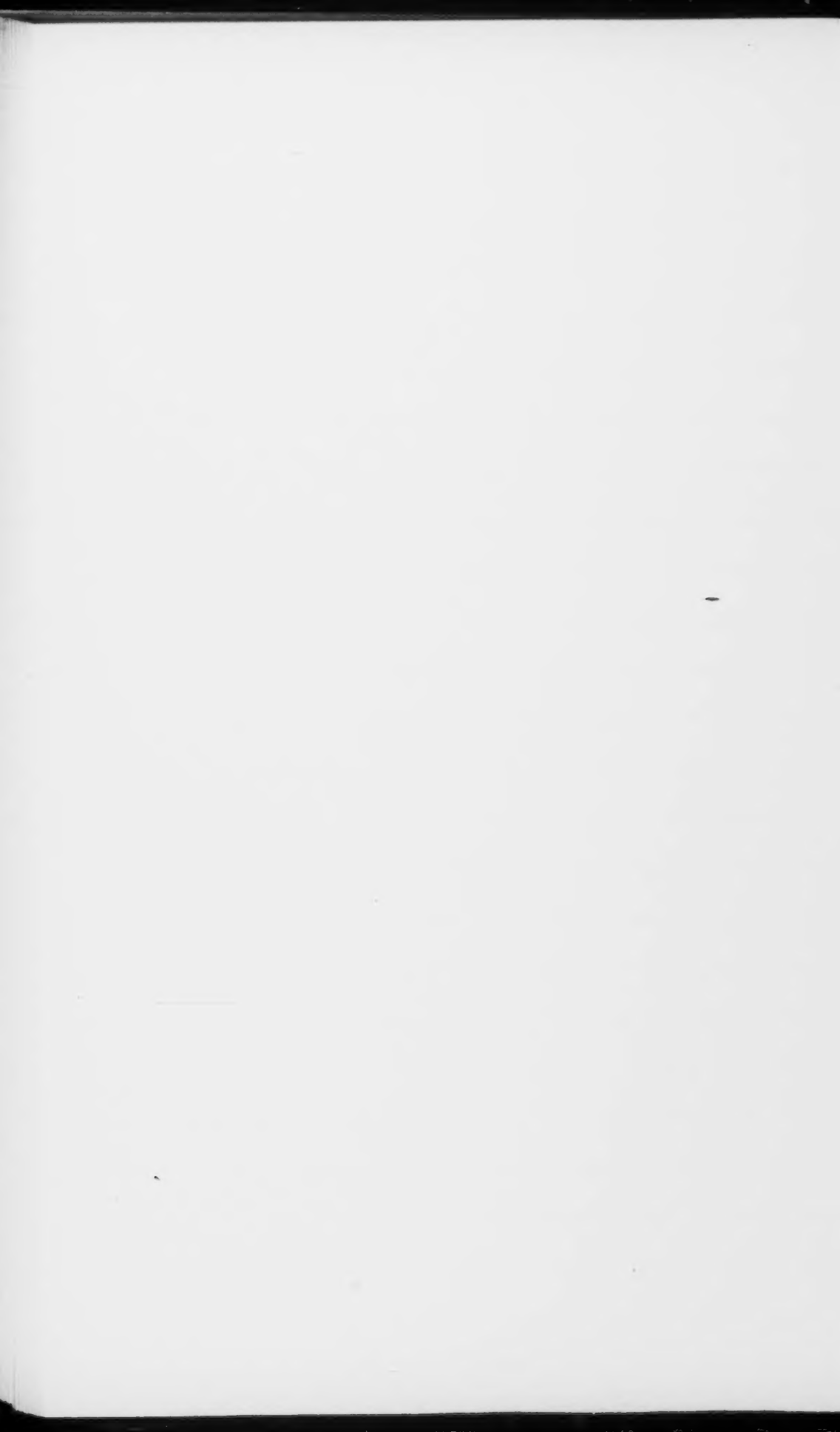
In Moe v. Salish & Kootenai Tribe, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), this Court was required to determine the validity of a state cigarette sales tax as applied to an Indian smokeshop. The Court held that if the smokeshop sold cigarettes to non-Indians, the state could require the

Indian proprietor to collect the state tax.

Similarly in Washington v. Confederated Tribes, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), reh. denied 448 U.S. 911, (1980), another state cigarette sales tax case, this Court held the state may validly require a tribal smokeshop to affix tax stamps purchased from the state to individual packages of cigarettes prior to their sale to non-members of the Tribe.

These cases cited by the State are easily distinguishable from Petitioner's case. First, the treaties of the Tribes involved in these cases do not contain any provision such as that found in Article X of the 1831 Treaty with the Shawnee. Namely, that those Tribes would never be within the bounds of any state or territory, or subject to their laws.

Second, the State of Washington has both civil and criminal jurisdiction over tribal members on the respective reservations pursuant to 25 U.S.C. section 1321, et seq.



Kansas, despite numerous opportunities to do so has never opted to assume civil or criminal jurisdiction over tribal members in the State of Kansas.

The cases cited by Plaintiff are inopposite to this case. The State of Kansas has no criminal jurisdiction over Petitioner.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE KANSAS SUPREME COURT HAS DECIDED THE FEDERAL INDIAN LAW ISSUES IN A MANNER CONTRARY TO APPLICABLE DECISIONS OF THIS COURT.

A. Federal Indian Law

The general rule of Federal Indian Law pertaining to assumption of state jurisdiction over Indian lands is clear. In the absence of congressional authority neither State nor Federal Courts have subject matter jurisdiction over crimes committed by Indian defendants within Indian Country.

Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); Worcester v. Georgia, (U.S.) 6 Pet. 515, 8 L.Ed. 483 (1832); Ex Parte: In the matter of Kang Gi Shun Ca,



Otherwise known as Crow Dog, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). United States v. John, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978)

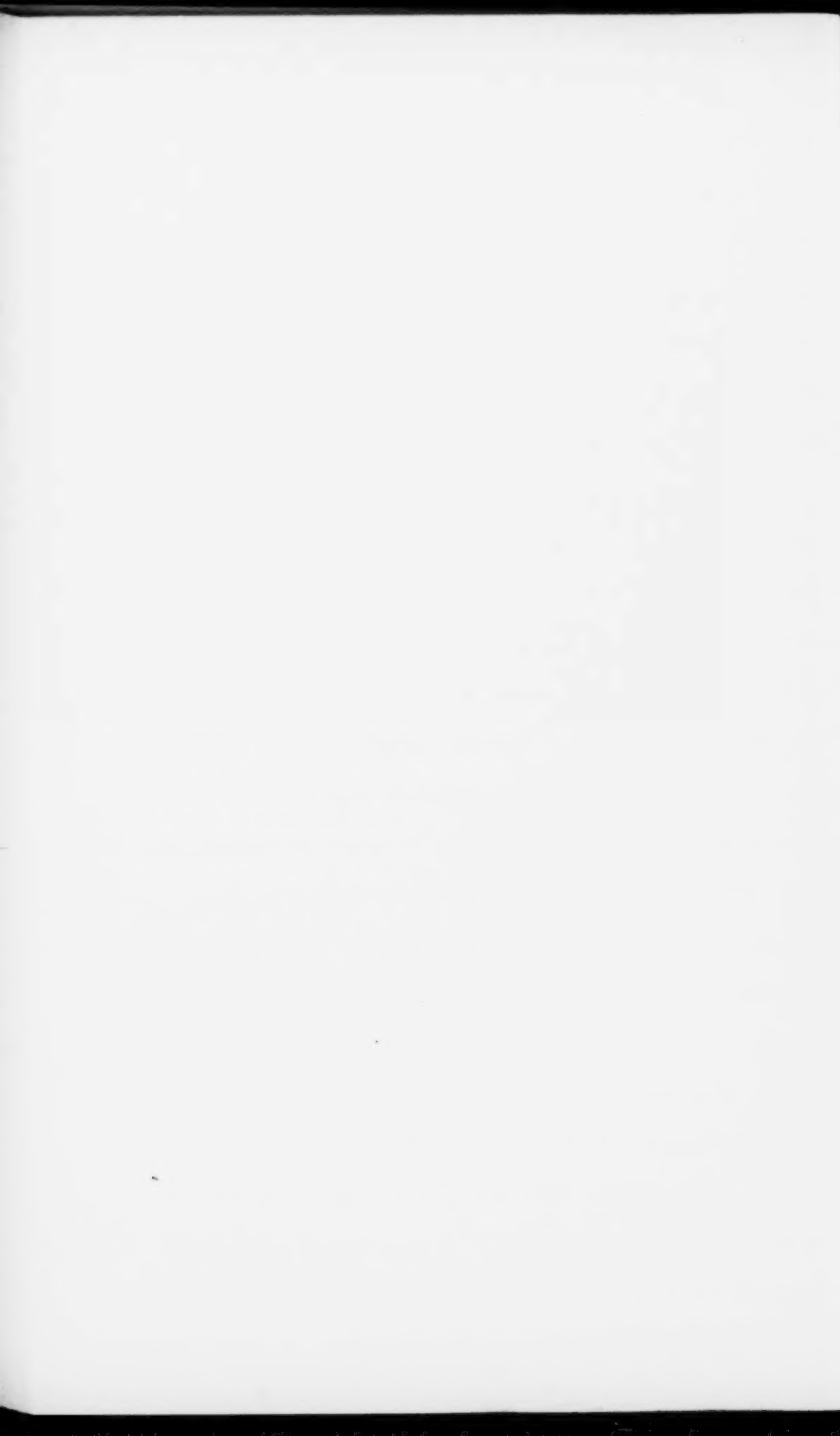
"Indian Country" is defined by 18 U.S.C. section 1151, which provides as follows:
...means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Petitioner's land is Indian Country pursuant to 18 U.S.C. section 1151(a) because the land is within the boundaries of the



Shawnee reservation as established by the 1825, 1831 and 1854 Treaties with the Shawnees. Absentee Shawnee Tribe of Indians of Oklahoma v. The State Of Kansas, 862 F.2d 1415, 1419 (10th. Cir. 1988) (...The 1854 Treaty with the Shawnee established a 200,000 acre Reservation...).

The Shawnee reservation as it existed in 1854 has never been diminished by Congress. While Congress has the power to diminish reservations unilaterally, Solem v. Bartlett, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed. 2d 443 (1984), the "traditional solicitude for Indian tribes," precludes the courts from diminishing Indian lands without "substantial and compelling evidence of a Congressional intention" to exercise its power to diminish Indian lands. Solem at 472. As a general rule, "'...[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise...'", Solem, at 470.



“...Diminishment... will not be lightly inferred...”, Solem, at 472. Congress must clearly evince an intent to change boundaries before diminishment will be found. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

There is no evidence that Congress diminished the Shawnee reservation as it was established pursuant to the 1854 Treaty.

Petitioner's land also fits the criteria of 18 U.S.C. section 1151(c) since the land is an Indian allotment, to which Indian title has not been extinguished.

Moreover, Petitioner's land, from the time of the 1825 Treaty with the Shawnees to the present, has always been treated as Indian Country by the United States Congress, the Bureau of Indian Affairs, the County Commissioners of Johnson County, the Sheriff's Department of Johnson County, Kansas and the non-Indians living in the area surrounding Shawnee Reserve No. 206. For example, on Oct. 15, 1982, a law was passed



by Congress to allow the Federal Courts to handle partition actions for Newton-McNeer Shawnee Reserve No. 206, Black Snake Shawnee Allotment No. 69 and the Maria Christiana Miami Allotment. The Act also provided that restricted Indian lands were to remain in a restricted status after partition. An Act to Provide for the Partitioning of certain Restricted Indian Land in the State of Kansas, (Act of October 15, 1982, Public Law 97-372, 96 Stat. 1645)

In the Legislative history Senator Cohen is quoted as follows:

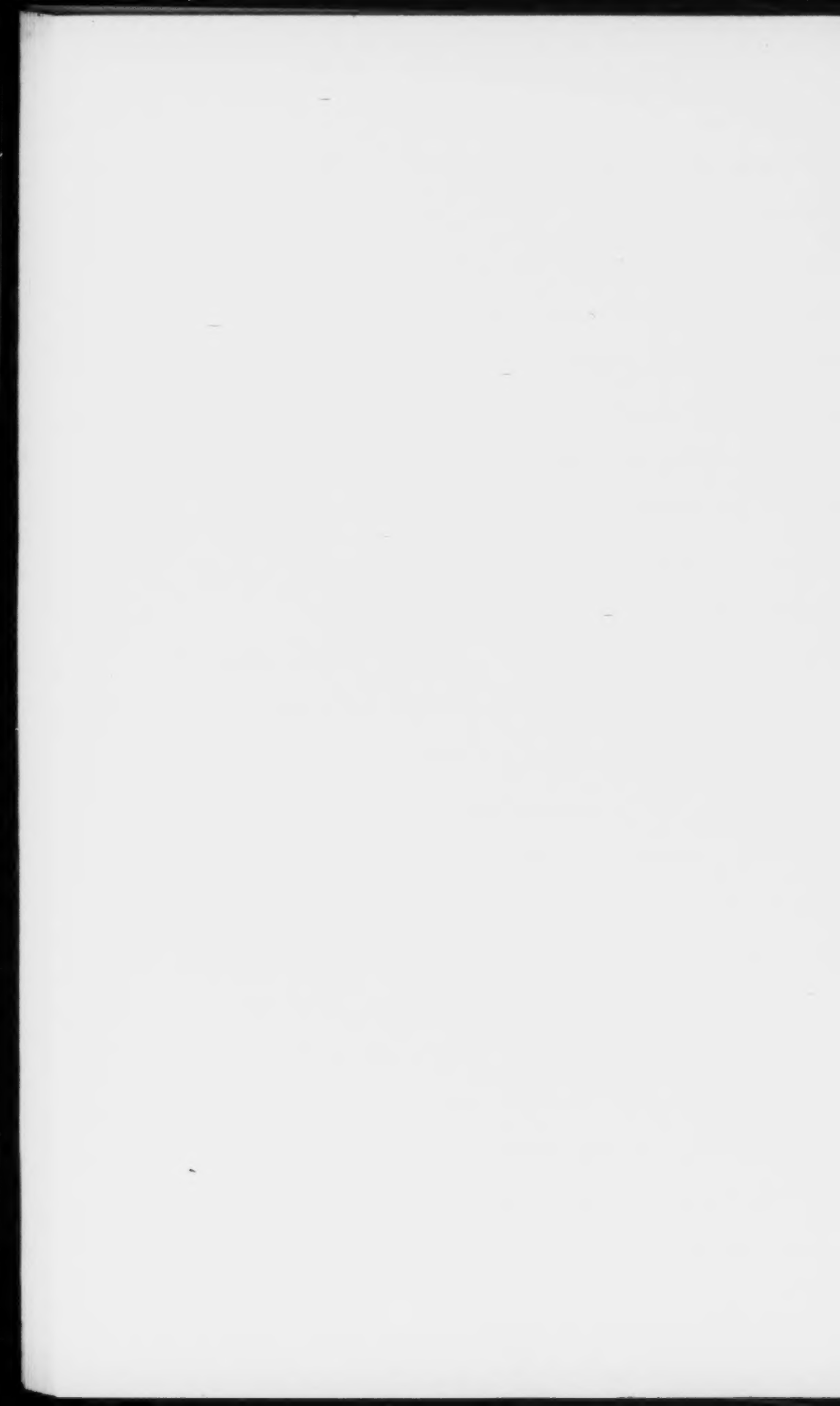
... Mr. Cohen:... These parcels of land were originally patented by the United States to individual members of the Shawnee ... Indians Tribe to be held in restricted fee status. A restricted fee patent is similar in almost all respects to a trust allotment in which legal title is held by the United States for the benefit of the Indian allottee. In either case, the land is generally exempt from the application of laws of the State or local taxation, laws of adverse possession,



or laws relating to partition or sale. The property cannot be alienated or transferred without the consent of the Secretary of the Interior...'. Senate Report, 97-107, 97th Congress, 3rd Session, at 13015.

Petitioner's land is under the jurisdiction of the Cherokee Nation, not the State of Kansas, since Petitioner is an enrolled member of that tribe, with a registration number of C0000127, and certified as a member of the Cherokee Band of Shawnee Indians who are lineal descendants of the Shawnee Nation as it existed in 1854. The Petitioner is a descendant and heir of Shawnee Indian, Newton McNeer, the original owner of Shawnee Reserve 206 and is an owner of Shawnee Reserve 206 in restricted status. Shawnee Reserve 206 is also certified as being tax exempt by the State of Kansas.

In Op. Sol. M27781, 55 I.D. 14, 50 (25 Oct. 1934), it was stated that:
...The Sovereign powers of the tribe extends over the property as well as the person of



its members...

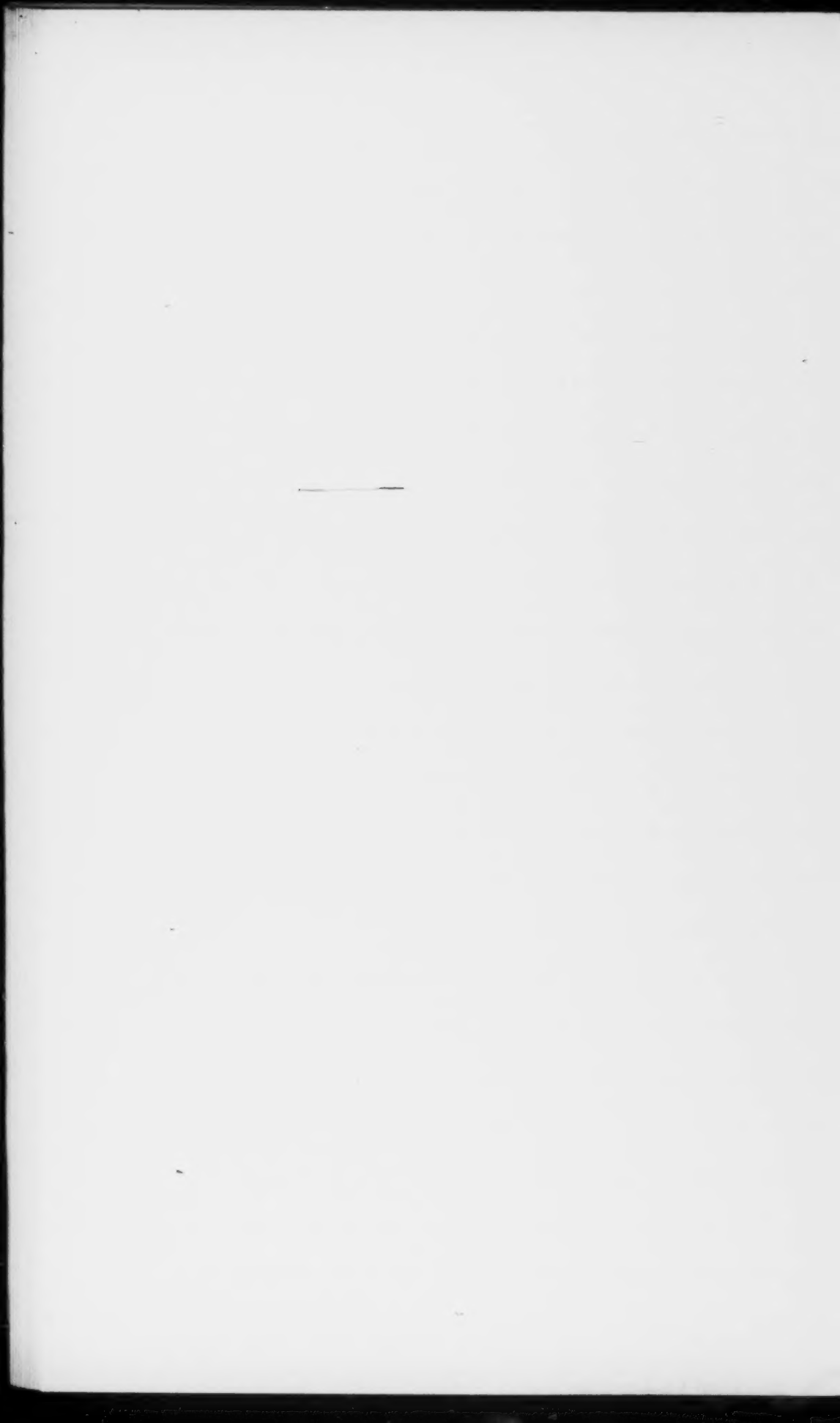
The Constitution of the Cherokee Nation, Article III, Membership, Section 1. reads as follows:

...All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokee of the Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokee as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants...

The Treaties with the Cherokees and the Agreement between the Shawnees and the Cherokees, discussed below, also show that Petitioner's land is under the jurisdiction of the Cherokee Nation

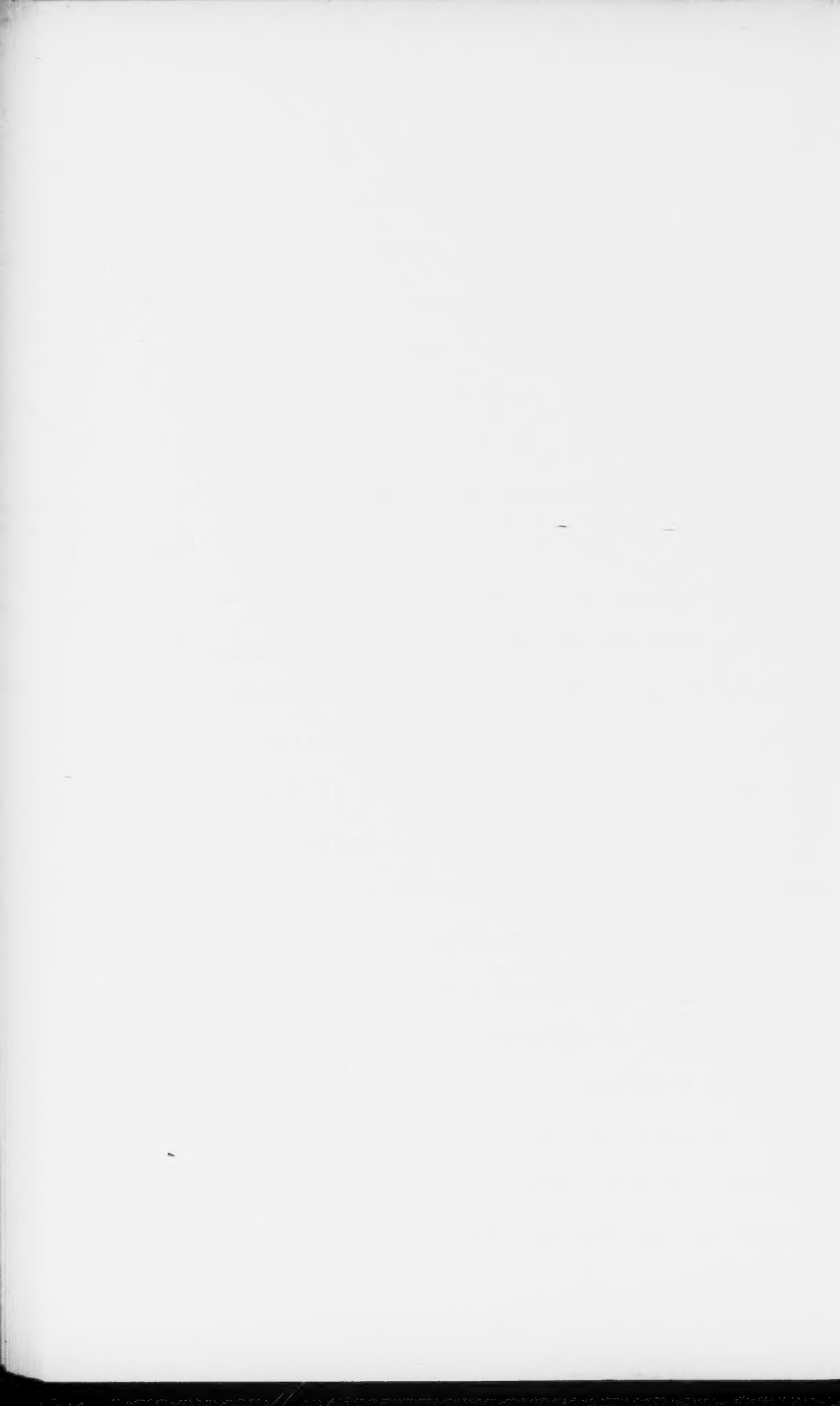
In 1835, the United States and the Cherokee Nation entered into a treaty at New Echota, Treaty with the Cherokee, December 29, 1835, (7 Stat. 478). Article 5, of this Treaty reads as follows:

...The United States hereby covenant and agree that the lands ceded to the Cherokee



Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of congress as have been passed or may be passed regulating trade and intercourse with the Indians;... (emphasis added.)

In 1866, the United States and the Cherokee Nation entered into a treaty, Treaty with the Cherokee, July 19, 1866, (14 Stat. 799). Provisions were made whereby the Shawnee Indians, members of the Shawnee Nation as the Shawnee Nation existed in 1854,



could join with the Cherokee Nation:

...Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokee then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens...

An Agreement Between the Shawnee and Cherokee, concluded June 7, 1869, and approved by the President June 9, 1869, states the following:

...And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the Said Shawnees, from the sale of the lands in the State of Kansas known as the Absentee Shawnees Lands, in accordance with the resolution of Congress, approved

April 7th, 1869, entitled " A resolution for the relief of settlers upon the Absentee Shawnee Lands in Kansas," and also to such as properly belong to said tribe who may be as present elsewhere, and including those known as the Absentee Shawnee now residing in Indian Territory---into the country of the said Cherokees, upon unoccupied lands east of 96 degrees; and that the said Shawnee shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation;...

On June 9, 1869, the Cherokee Nation thus became the successor Nation for the Loyal Shawnees of the Shawnee Nation as the Shawnee Nation existed in 1854.

The Act of May 28, 1830, 4 Stat. at L. p 411, chap. 148 allowed and provided for the Cherokee Nation, to become the successor Nation with jurisdiction over the Loyal Shawnee, members of the Cherokee Nation, who

are lineal descendants of the Shawnee Nation as it existed in 1854 and owned restricted land within the limits of the Shawnee reservation as established by the 1854 Treaty with the Shawnee.

With the Cherokee Nation as the successor nation to the Shawnees, the Cherokee Nation Tribal Council became the governing body and the Cherokee Constitution became the Laws governing the Cherokee Band of Shawnee Indians, who are the descendants of the Shawnee Nation as it existed in 1854.

In John D. Brown v. Boston Steele, 23 Kan. 672 (1880), the following is stated about Cherokee Nation jurisdiction over the Loyal Shawnee located in Kansas:

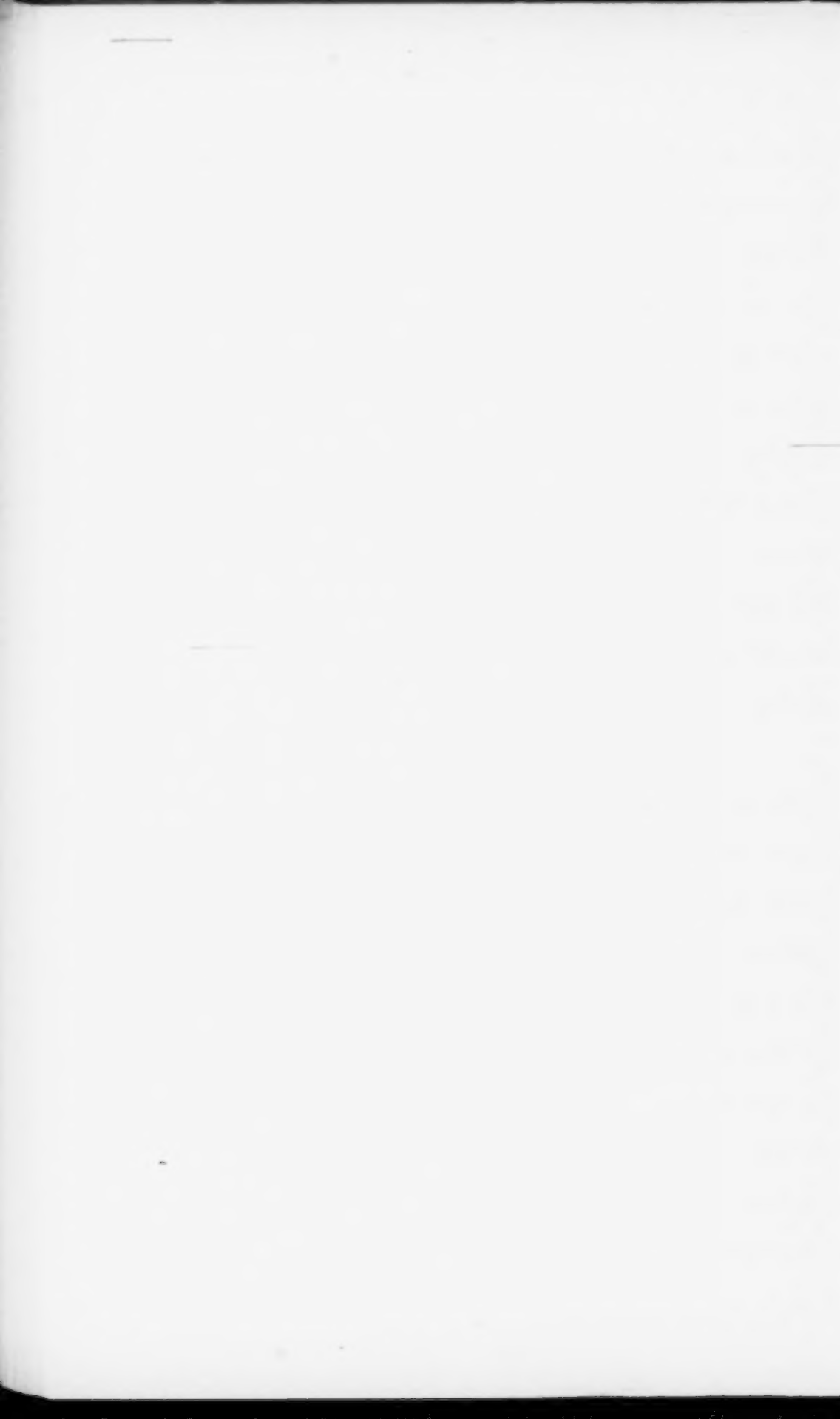
...The Cherokee Laws govern us as to general police regulation and crime; the Shawnee council act as to ownership of property. If the question were one of fact for original determination in the courts, it might be difficult to hold from the fact that a distinct, independent tribal organization remained. But, as we have seen, that



question is for the political branch of the government, and the courts follow its ruling. Now it appears that the agent for the Cherokees acts as agent for the Shawnee; that he convenes their council; that council acts upon questions of property and heirship, and that its acts thereon are received and recognized by the Interior Department in Washington...Under those circumstances, it is not for the courts to say that the tribal organization has been abandoned...

Brown, at page 675.

The Shawnee Nation or Tribe as it existed in 1854, is presently recognized as three distinct Tribes, the Cherokee Shawnee, Loyal Shawnee, who are members of the Cherokee Nation, the Eastern Shawnee Tribe and the Absentee Shawnee Tribe. Each Nation or Tribe has its own Tribal organization, recognized by all the political departments of the Federal Government, as a distinct people, under the protection of the Constitution of the United States, and



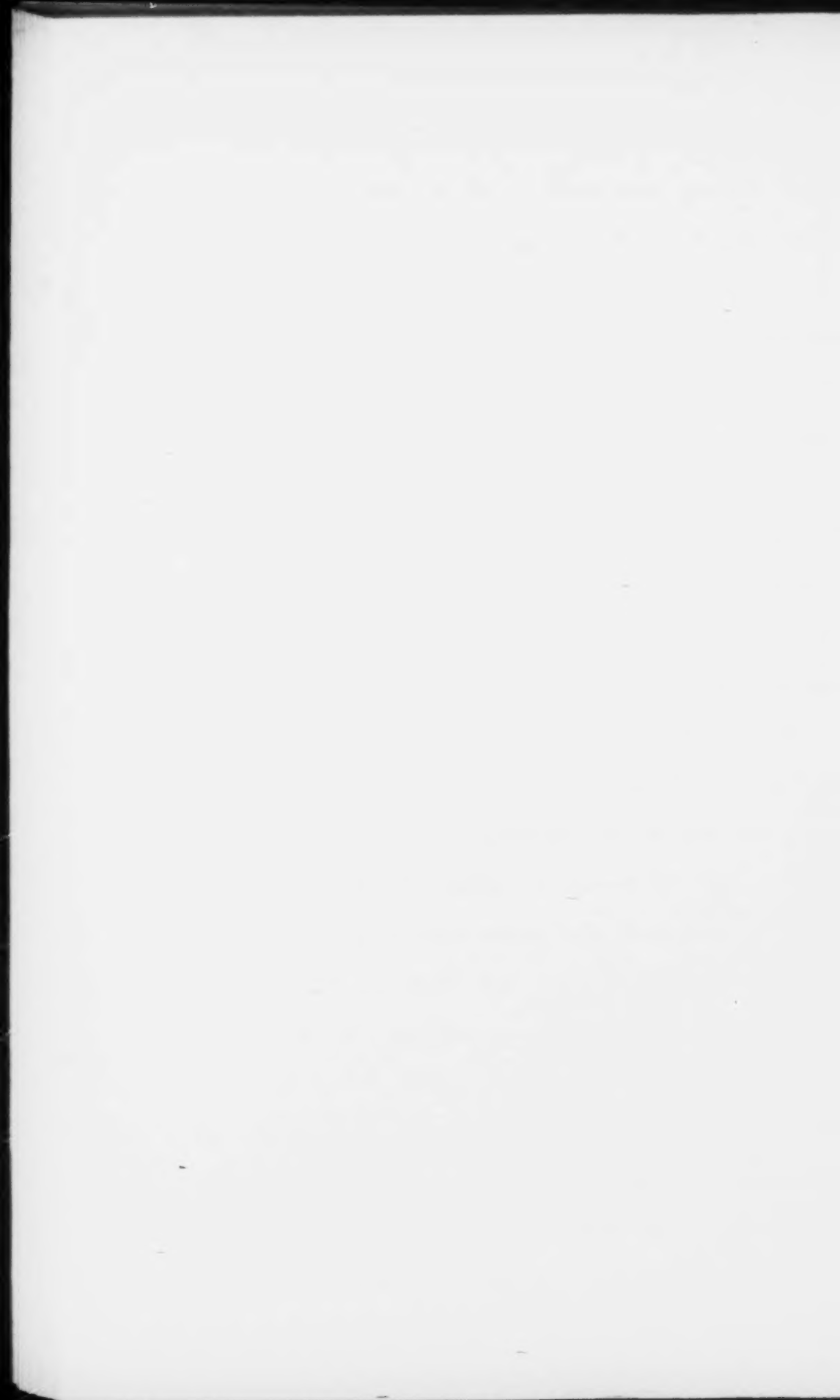
subject only, to the laws of Congress and each Tribes own Constitution approved by the Commissioner of Indian Affairs.

Pursuant to section 5 of the Act of December 20, 1982, Public Law 97-372, 96 Stat. 1815, a roll was prepared and used as the basis for the distribution of apportioned share of judgement funds awarded the Shawnee Tribe in dockets 64, 335, and 338 by the Indian Claims Commission and in docket 64-A by the U.S. Court of Claims of all persons of Loyal Shawnee ancestry as follows:

...Who were lineal descendants of the Shawnee Nation as it existed in 1854, based on the roll of the Loyal Shawnee compiled pursuant to the Act of March 2, 1889 (25 Stat.

(994)...awarded the Absentee Shawnee Tribe of Oklahoma on behalf of the Shawnee Nation in Indian Claims Commission docket 334-B as a Loyal Shawnee descendants; and (iii) Who are not members of the Absentee Shawnee Tribe of Oklahoma or the Eastern Shawnee Tribe of Oklahoma... 25 CFR Ch. I, page 195.

Loyal Shawnee, Jimmie D. Oyler, was



assigned a roll number of C0000127 and received a portion of the judgment funds.

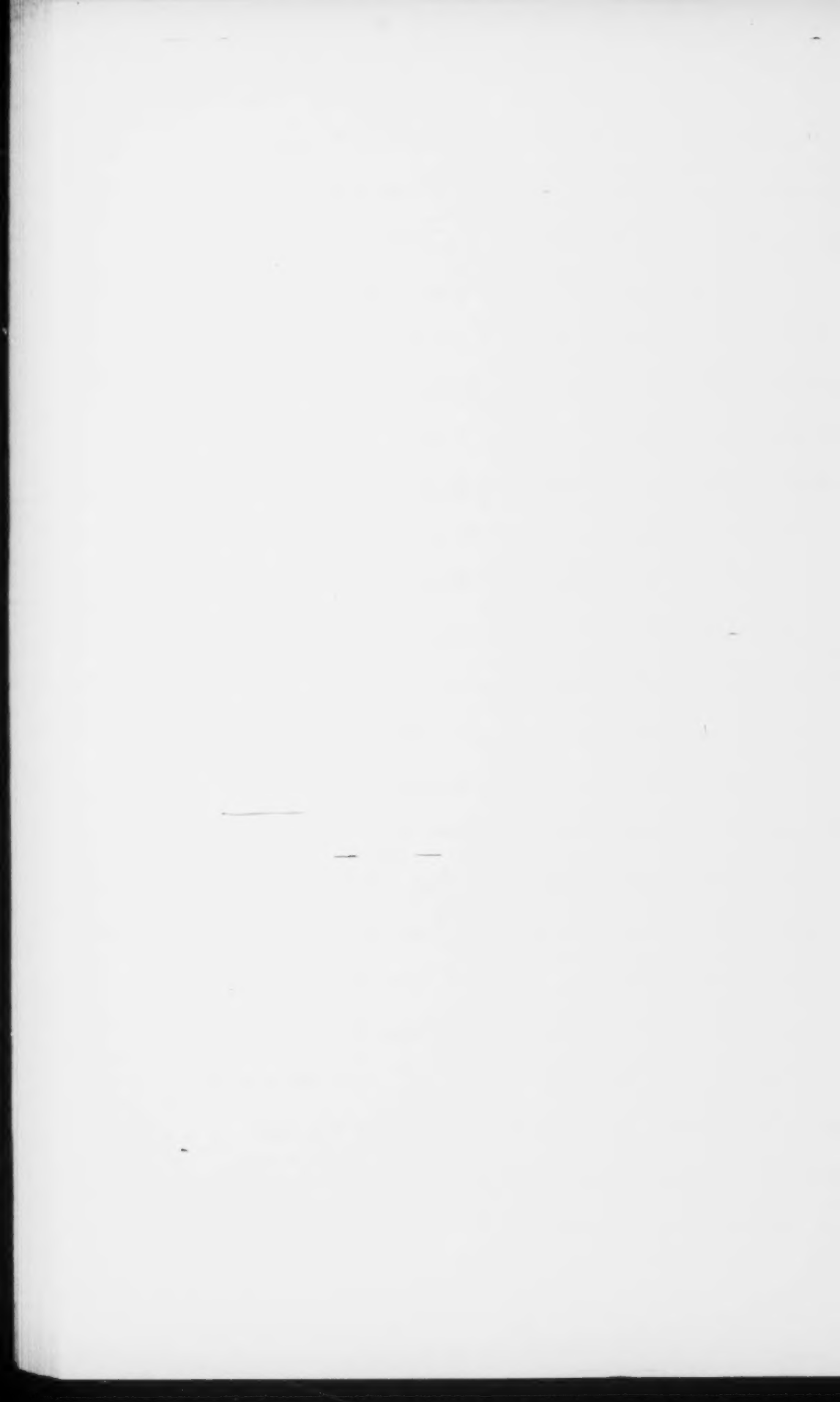
B. 18 U.S.C. section 3243

The State of Kansas has contended that 18 U.S.C.A. section 3243 is a grant of congressional authority from the United States Government to the State of Kansas and that this law allows the District Court of Johnson County to prosecute Petitioner.

18 U.S.C.A. section 3243 provides:

...Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

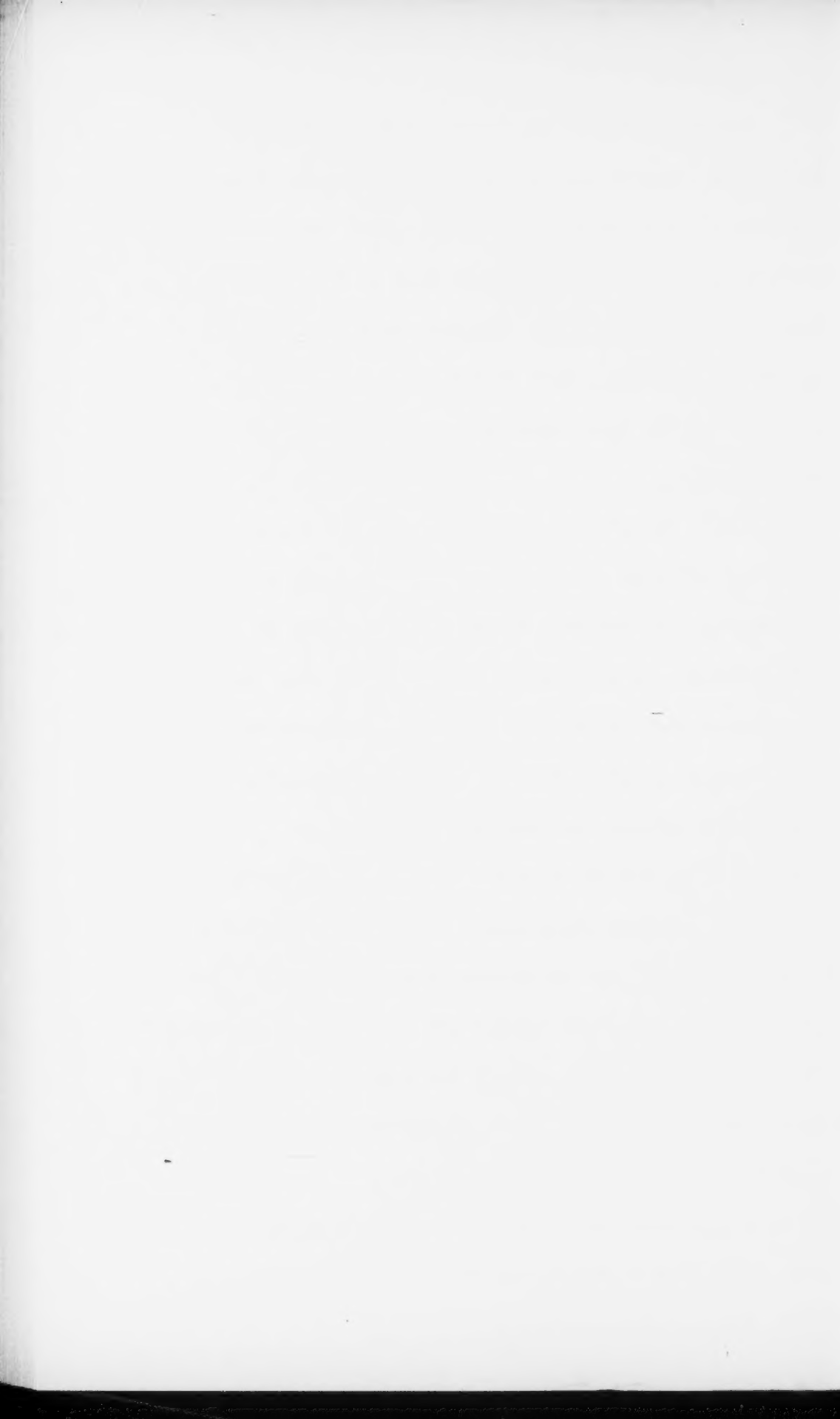
This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations...



This statute applies to misdemeanor offenses committed by members of the four tribes of northeast Kansas, that is, the Kickapoo, Potawatomi, the Sac & Fox and the Iowa. Iowa Tribe of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986). This law does not apply to Petitioner.

This is clear from the legislative history of the statute which consist of three documents: a letter from Congressman W. P. Lambertson, a representative from the 2nd Congressional District, (Shawnee Reserve 206 is located within the 3rd. Congressional District) which encompassed the four reservation of northeast Kansas, a letter from the Acting Secretary of the Interior, E. K. Burlew and an attached memorandum. A careful reading of these documents shows that 18 U.S.C. 3243 was meant to apply only to the four reservations. For example, Congressman Lambertson states in his letter:

...All parties are agreed on this bill - the Indians, the Superintendent, the Indian



Agencies on the Kansas reservation, which are all in my district, and the people that are on and surround the reservation...

Shawnee Reserve 206 is not and was not within Congressman Lambertson's 2nd district, but is surrounded by the 3rd congressional district. The memorandum attached to Secretary Burlew's letter contains no fewer than five references to "the four tribes" or "four reservations." Moreover, both the letter from Secretary Burlew and the attached memorandum clearly state that the passage of this legislation had been requested by the four tribes of northeast Kansas, e.g. the Sac & Fox, Kickapoo, Potawatomi and the Iowa. There is no resolution from the Cherokee Nation (Cherokee Shawnee, Loyal Shawnee), requesting the State of Kansas assume jurisdiction over Shawnee Reserve 206.

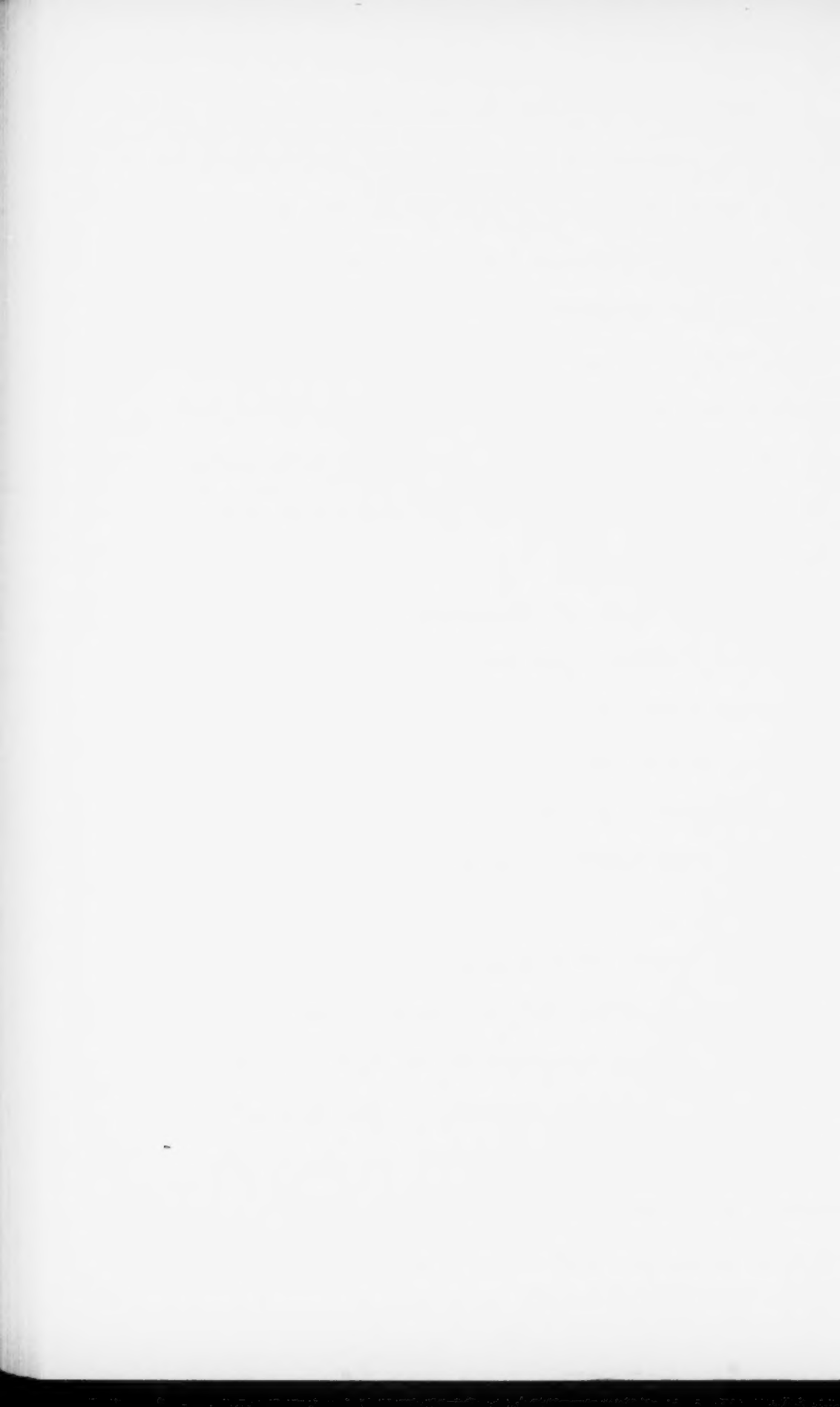
The legislative history of 18 U.S.C.A. section 3243 shows that this grant of criminal jurisdiction to the State of Kansas does not apply to Petitioner.



Had the State of Kansas wanted to assume criminal jurisdiction over this Petitioner it could have done so by following the mandate of 25 U.S.C. section 1321, et. seq. This law of Congress allowed states to assume both civil and criminal jurisdiction over Indians within Indian Country. Kansas has chosen not to do so. The state is therefore precluded from exercising criminal jurisdiction over Petitioner.

In the case of Oklahoma v. Klindt, 782 P.2d 401 (1989), the issue facing the Oklahoma Court of Criminal Appeals was whether state courts had criminal jurisdiction over an Indian Petitioner charged with committing a crime in "Indian Country."

The Court in its analysis stated: Jurisdiction over Indian Country has been given to either the states or the federal government through statutes. The Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) provided the states permission to assume criminal and civil jurisdiction over



any "Indian Country" within the borders of the state. Under this public law, Oklahoma could have, without the consent of the affected Indians, assumed jurisdiction over any Indian Country in the state by constitutional amendment...The state of Oklahoma has never acted pursuant to Public Law 83-280...to assume jurisdiction over the "Indian Country" within its borders...Accordingly, the state of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

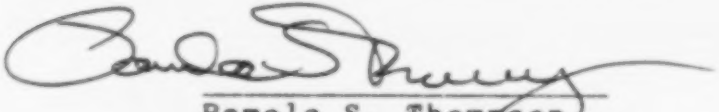
As Petitioner has shown, the alleged crime was committed by an Indian within Indian Country. Since the state of Kansas has never assumed criminal jurisdiction over Indians, the state cannot try and convict the Petitioner in state courts.



CONCLUSION

Wherefore, Petitioner respectfully prays
that a writ of certiorari be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Pamela S. Thompson', written over a horizontal line.

Pamela S. Thompson
P.O. Box 104
Horton, Kansas 66439
(913) 742-3707
Attorney for Petitioner



APPENDIX

IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS, CRIMINAL DEPARTMENT

STATE OF KANSAS,	Plaintiff,
vs.	No. K-62583
JIMMIE D. OYLER,	Defendant.

JOURNAL ENTRY

Now on this 5th day of March, 1990, this matter comes on for further proceedings before the Honorable Earle D. Jones, Judge of the District Court of Johnson County, Kansas. The State appears by Melinda S. Whitman, an Assistant District Attorney. The defendant appears in person and with his counsel, Pamela S. Thompson.

Thereupon, this matter comes on before the Court on the defendant's motion to dismiss the criminal Complaint.

The Court, being well and duly advised in the premises, denies the defendant's motion to dismiss. The matter is set for trial to the Court on the 3rd day of April, 1990 at 8:30 a.m.

15/
Earle D. Jones,
District Judge
Court Number 8
Johnson County
District Court

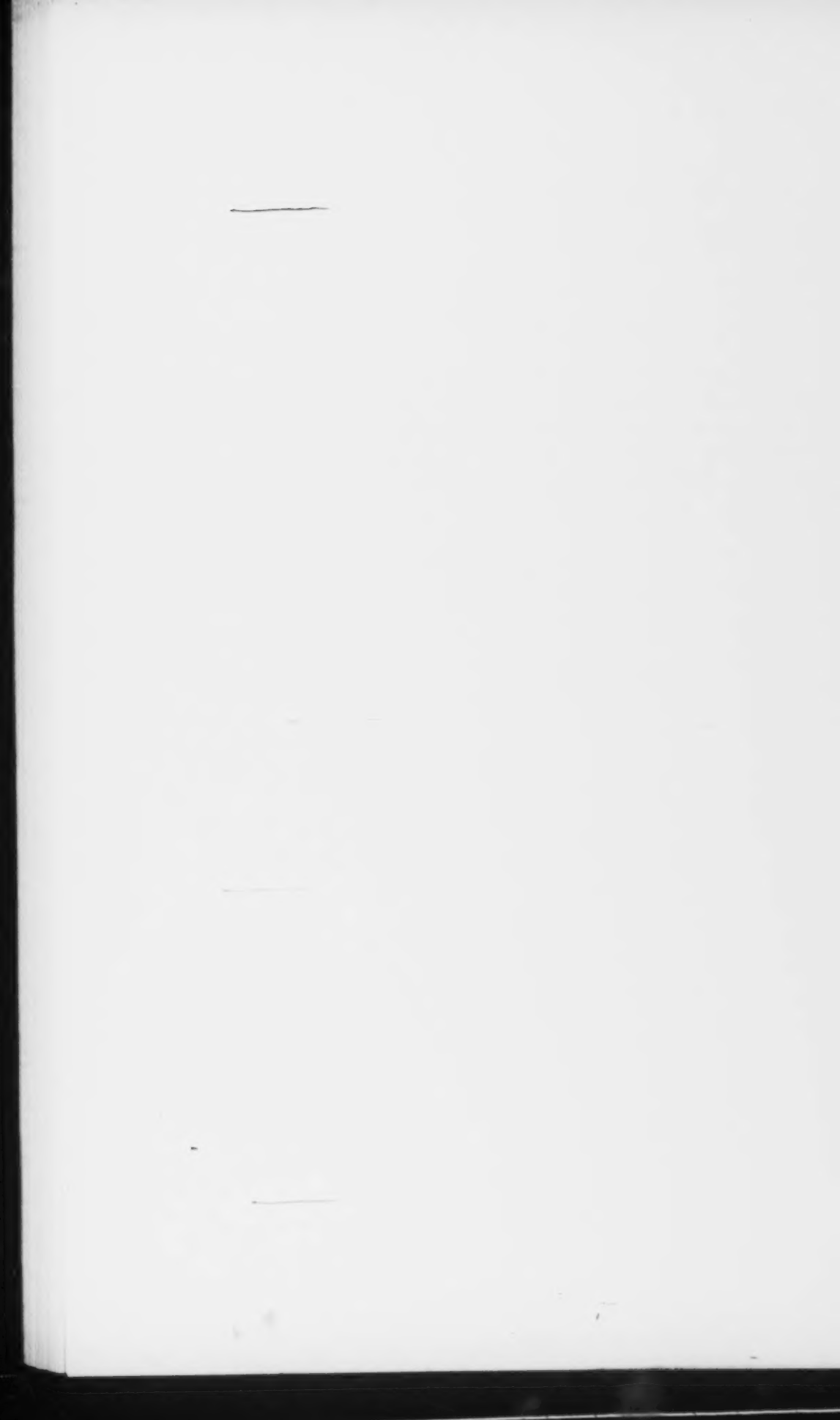
Submitted by:

15/
Melinda S. Whitman
11610/mas
Assistant District
Attorney

CERTIFICATE

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid, to Pamela Thompson, Attorney at Law, P.O. Box 104, Horton, Kansas 66439 on this 27th day of March, 1990.

15/
Melinda S. Whitman



SUPREME COURT ORDER

DISTRICT CASE NO.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

PAMELA S. THOMPSON
P.O. BOX 104
HORTON, KS 66439

JIMMIE D. OYLER

PETITIONER,

V

NO. 90-64967-S

HONORABLE EARLE D. JONES,

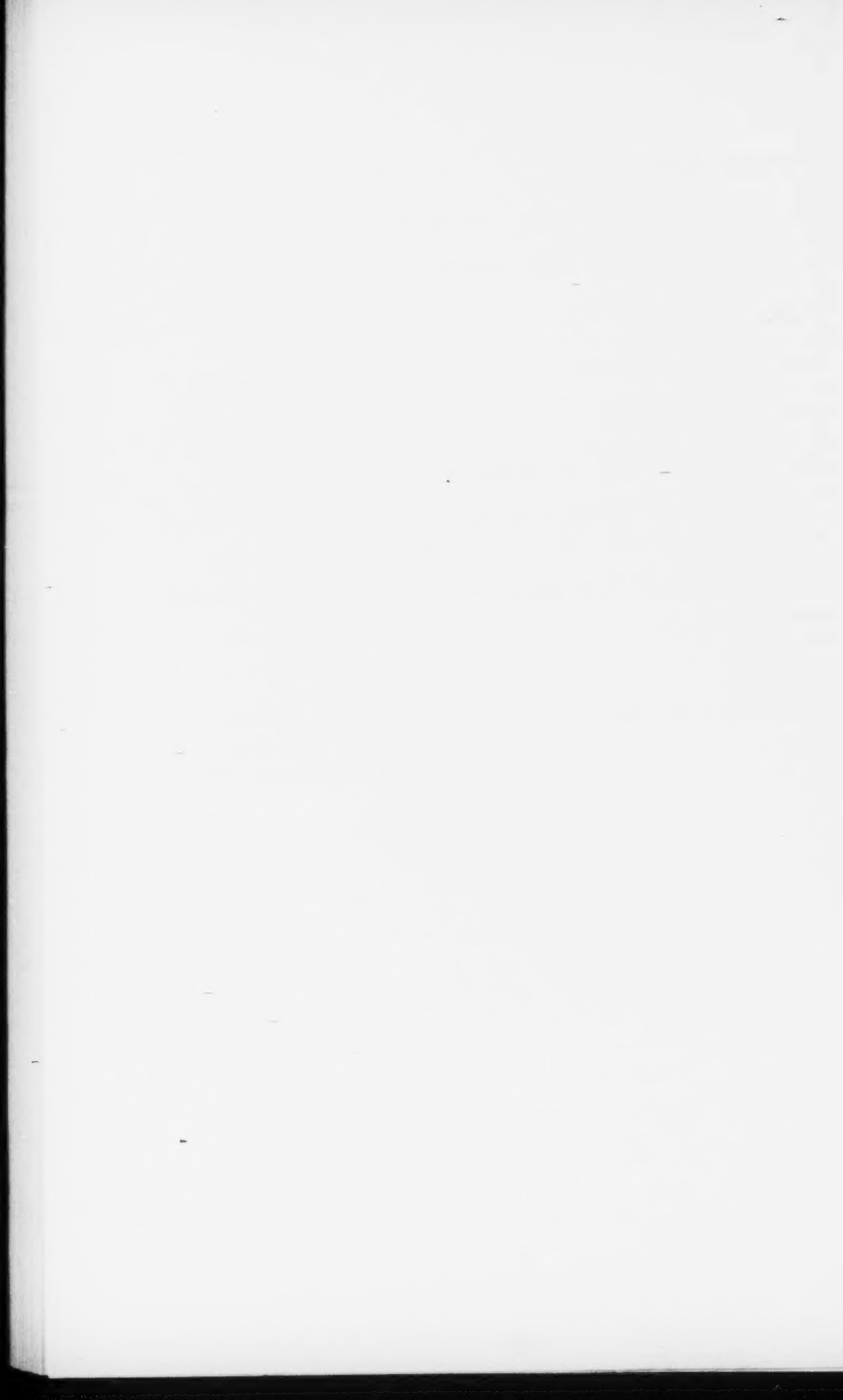
RESPONDENT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING
ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR WRIT OF PROHIBITION AND/OR
MANDAMUS.
DENIED.

DATE: 04/23/90

YOURS VERY TRULY
LEWIS C. CARTER
CLERK, SUPREME COURT



TREATIES

Treaty with the Shawanoe Nation, January 31, 1786 (7 Stat. 26), Article II:

... The Shawanoe Nation do acknowledge the United States to be the sole and absolute sovereigns of the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the 14 day of January, one thousand seven hundred and eighty-four...

Article V:

...The United States do grant peace to the Shawanoe Nation, and do receive them into their friendship and protection...

Article VII:

...If any citizen or citizens of the United States, shall presume to settle upon the land allotted to the Shawanoes by this treaty, he or they shall be put out of the protection of the United States...

Ordinance of the Confederated Congress, July 7, 1787, Article III:

... The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them

without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws found in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them...

Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's, Kickapoos, Piankeshaw's, and Kaskaskias, August 3, 1795, (7 Stat. 49), Article IV:

...The Tribes to which those goods are to be annually delivered, and the proportions ... To the Shawanese, the amount of one thousand dollars...

Article V:

... And the said tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever...

Treaty with France, April 30, 1803 (8 Stat. 200). Article VI:

...The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon...

Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, July 22, 1814, (7 Stat. 118), Article II:

...The tribes or bands above mentioned engage to give their aid to the United States in prosecuting the war against Great Britain,...

Article III:

...who have preserved their fidelity to the United States throughout the war, again acknowledge themselves under the protection of said states, and no other power whatever:...

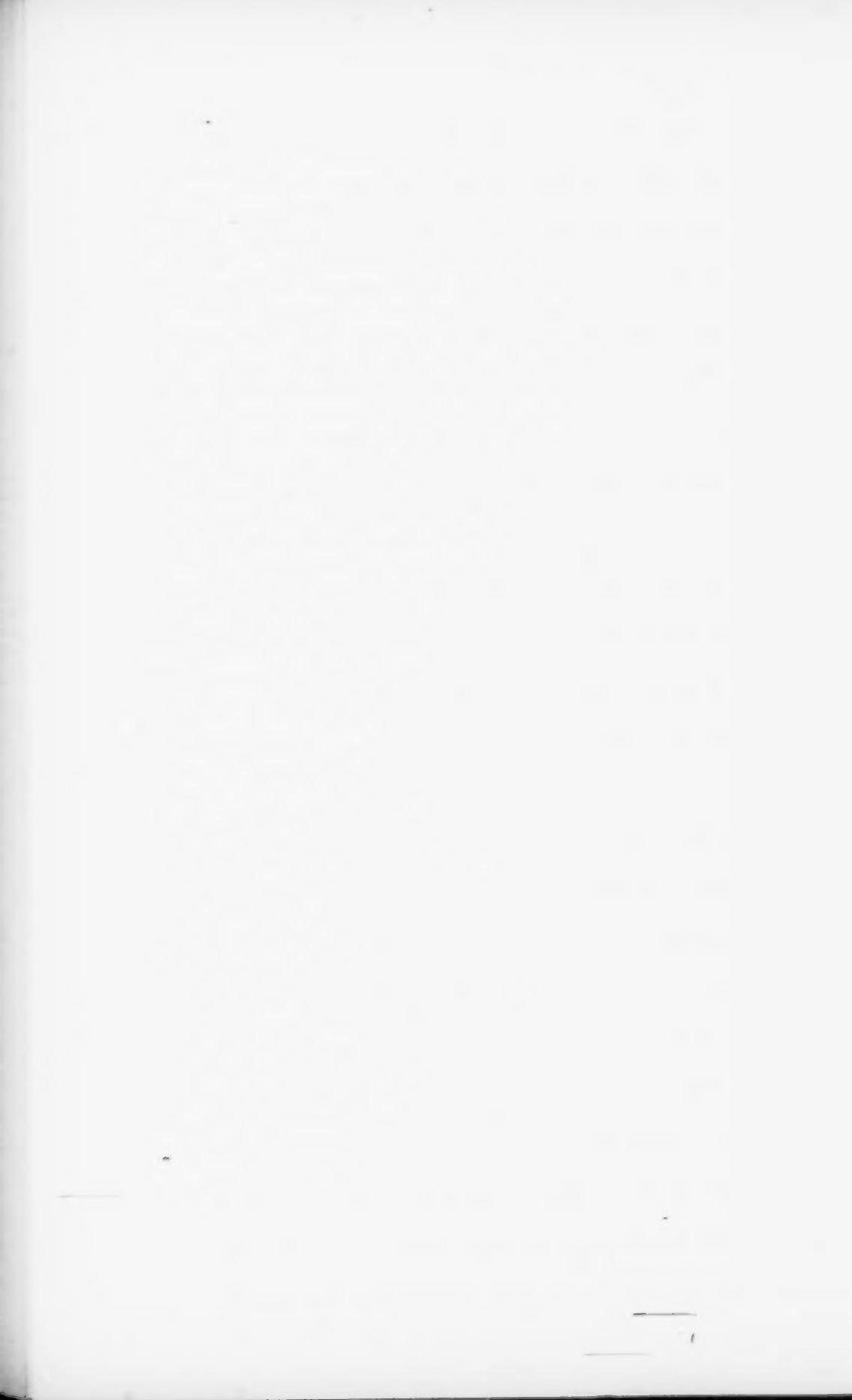
Treaty with Great Britain, December 24, 1814 (8 Stat. 218), Ninth Article:



...The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indian with whom they may be at war at the time of such ratification; and forthwith whom they may be at war at time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities;... Provided always... Provided always...

Treaty with the Wyandotte, Seneca, Delawares, Shawanese, Potawatomie, Ottawas, and Chippewa, tribes of Indians, on September 29, 1817 (7 Stat. 160), Article 15:

...The tracks of land herein granted to the Chiefs, for the use of the Wyandotte, Shawnees, Seneca, and Delaware Indians, and the reserve for the Ottawa Indians, shall not be liable to taxes of any kind so long as such land continues the property of said



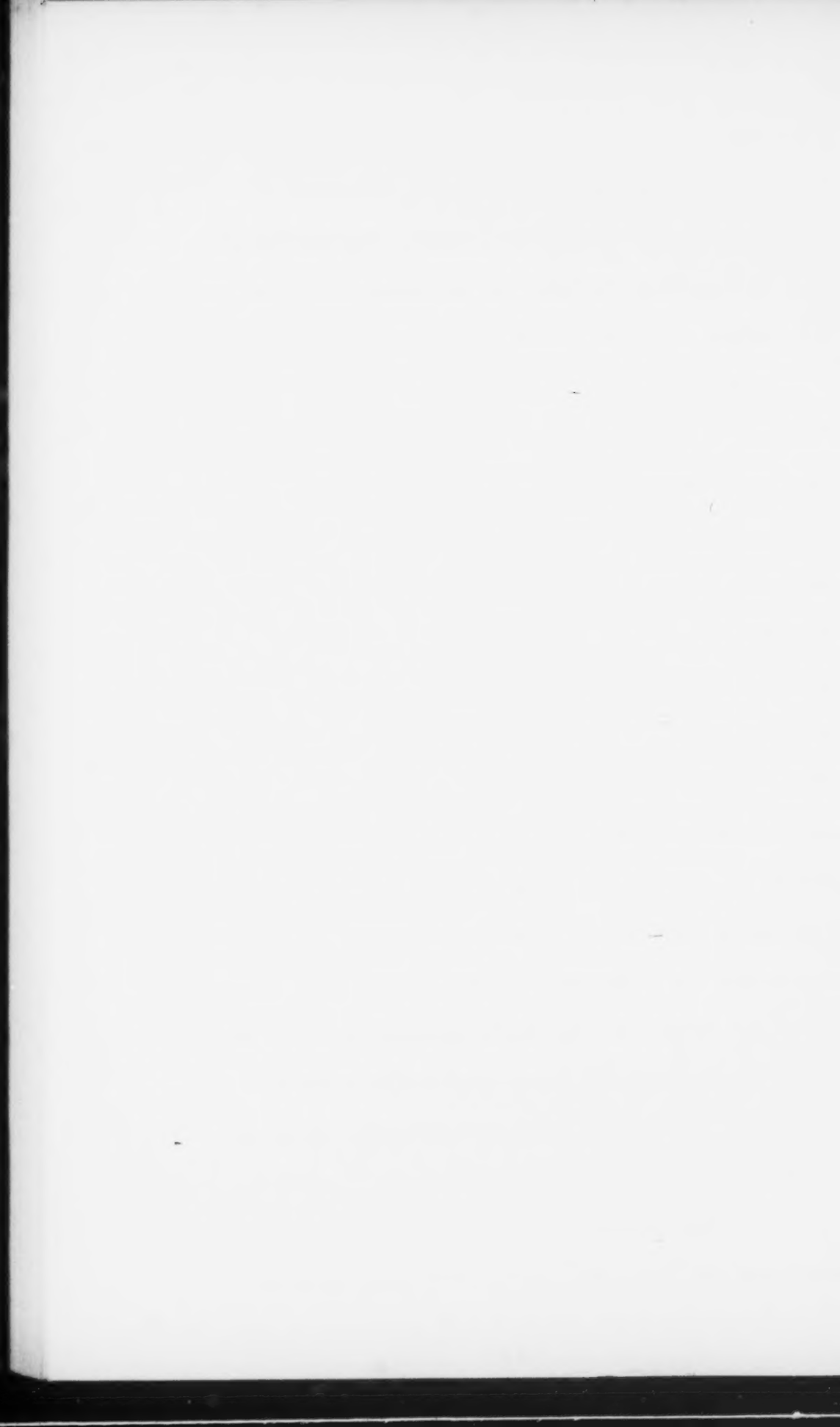
Indians...

Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, September 17, 1818 (7 Stat. 178).

Article 1:... It is agreed, between the United States and the parties hereunto, that the several tracts of land, described in the treaty to which this is supplementary, and agreed thereby to be granted by the United States to the Chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the twentieth article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the use of said Indians, and held by them in the same manner as Indian reservations have been heretofore held...

Treaty with the Osage, June 2, 1825 (7 Stat. 240). Article 1:

...The Great and Little Osage Tribes or Nations do, hereby, cede and relinquish to



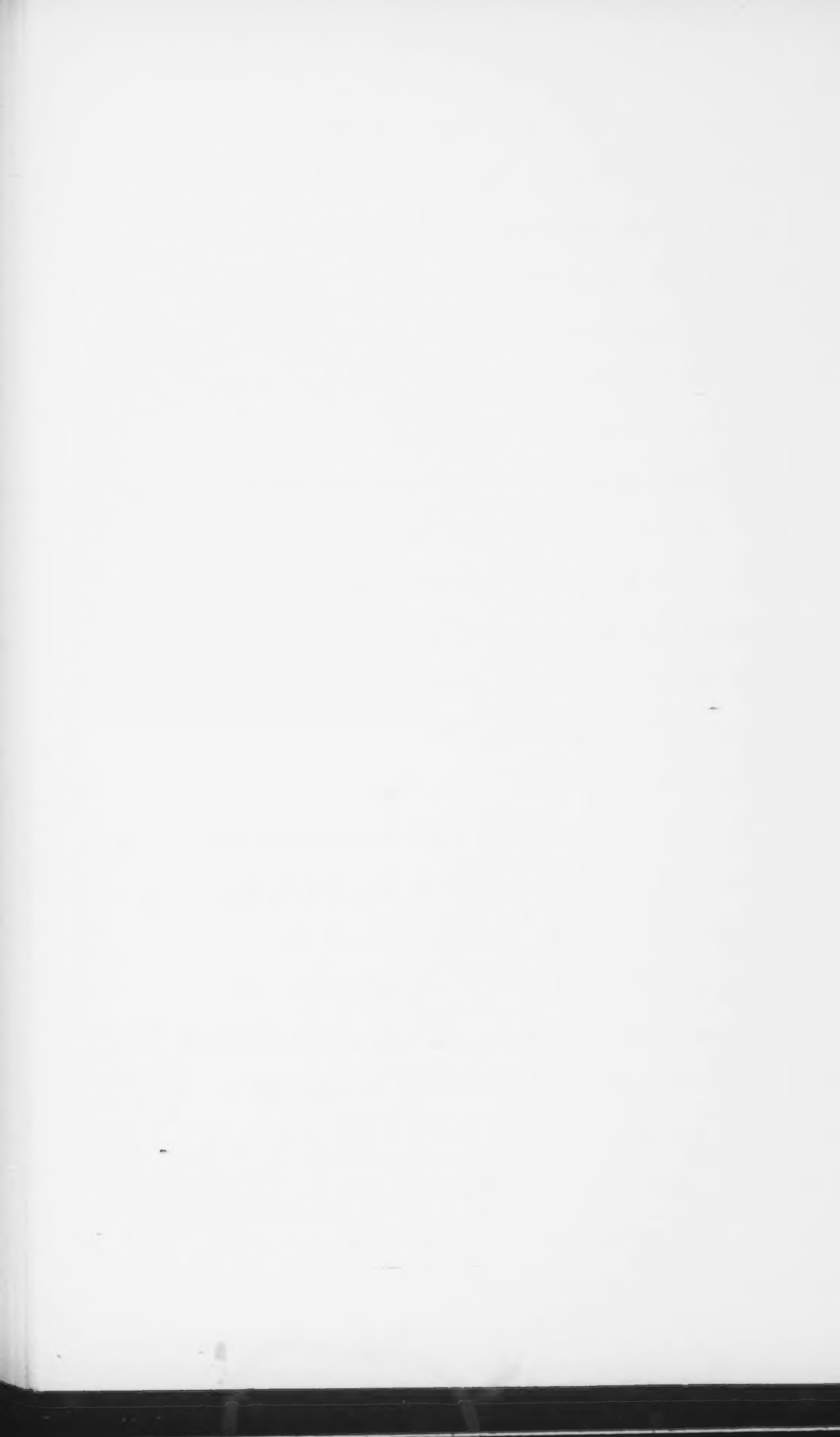
the United States, all their rights, title, interest, and claim, to lands...lying west of the said State of Missouri...South of the Kansas River, and East of a line to be drawn from the head source of the Kansas, Southwardly through the Rock Saline, with such reservations,...

Treaty with the Shawnee, November 7, 1825 (7 Stat. 284), Preamble:

... The Missouri Shawnee were in the possession of and located on a track of land settled with the permission of the Spanish Government 4 January, 1793...

Article 2:

... in consideration of the cessions aforesaid, The United States do, hereby, agree to give to the Shawnee Tribe of Indians, within the State of Missouri for themselves and for those of the same nation, now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to fifty (50) miles square, situated west of the State of Missouri, and within the purchase lately made



from the Osage, by treaty bearing date the second day of June, one thousand eight hundred and twenty five,...

Treaty with the Ohio Shawnee, August 8, 1831 (7 Stat. 355), Preamble:

...Whereas the President of the United States under the authority of the Act of Congress, approved May 28, 1830, has appointed a special commissioner to confer with the different Indian tribes residing within the constitutional limits of the State of Ohio, and to offer for their acceptance the provisions of the before recited act: And Whereas the tribe or band of Shawnee Indians ... assent to the conditions of said act, ... in order to obtain a more permanent and advantageous home for themselves and their posterity ... which, when ratified by the President of the United States, by and with the advice and consent of the Senate thereof, shall be mutually binding upon the United States and the said Shawnee Indians...

Article II:... a tract of land to contain one hundred thousand acres, to be

located under the direction of the President of the United States, within the track of land equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri...

Article X:

...The lands granted by this agreement and convention to the said band or tribe of Shawnee, shall not be sold or ceded by them, except to the United States. And the United States guarantee that the said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof; and further, that the President of the United States will cause said tribe to be protected at their intended residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever, and he shall have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence...

Treaty at New Echota, Treaty with the
Cherokee, December 29, 1835 (7 Stat. 478),

Article 5:

...The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of congress as have been passed or may be passed regulating trade and intercourse with the Indians;...

Treaty with the Shawnee May 10, 1854 (10 Stat. 1053), Article 2:

...All the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundreds thousand acres reserved by the Shawnee...

... if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family ... In the settlement known as Black Bob's settlement, in which he has an improvement, whereon he resides; and in that known as Long Tail's settlement, in which he has improvement whereon he resides, there are a number of Shawnee who desire to hold their land in common;...

Article 9:

... Congress may hereafter provide for the issuing, to such of the Shawnee as may make separate selections, patents for the

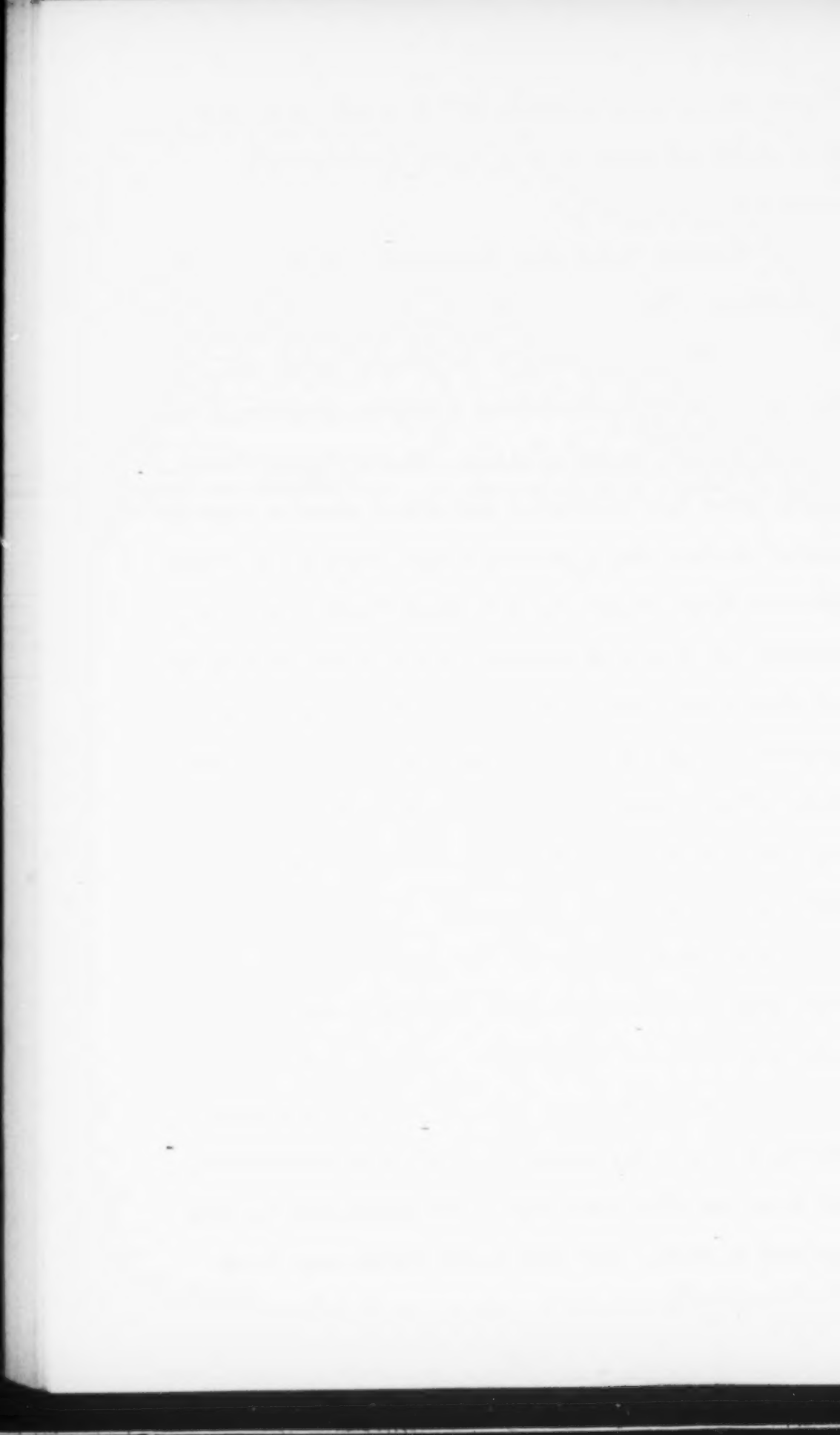
same, with such guards and restrictions as may seem advisable for their protection therein.

Treaty with the Cherokee, July 19, 1866
(14 Stat. 799), Article 15:

...Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokee then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens...

Agreement Between the Shawnee and Cherokee, concluded June 7, 1869, and approved by the President June 9, 1869:

...And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the Said Shawnees, from



the sale of the lands in the State of Kansas known as the Absentee Shawnees Lands, in accordance with the resolution of Congress, approved April 7th, 1869, entitled " A resolution for the relief of settlers upon the Absentee Shawnee Lands in Kansas," and also to such as properly belong to said tribe who may be as present elsewhere, and including those known as the Absentee Shawnee now residing in Indian Territory---into the country of the said Cherokees, upon unoccupied lands east of 96 degrees; and that the said Shawnee shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation;...

CONSTITUTIONAL PROVISIONS

The Constitution of the State of Kansas, Section 1, July 29, 1859:

...That all rights of individuals should continue as if no state had been formed or change in government made...

STATUTES

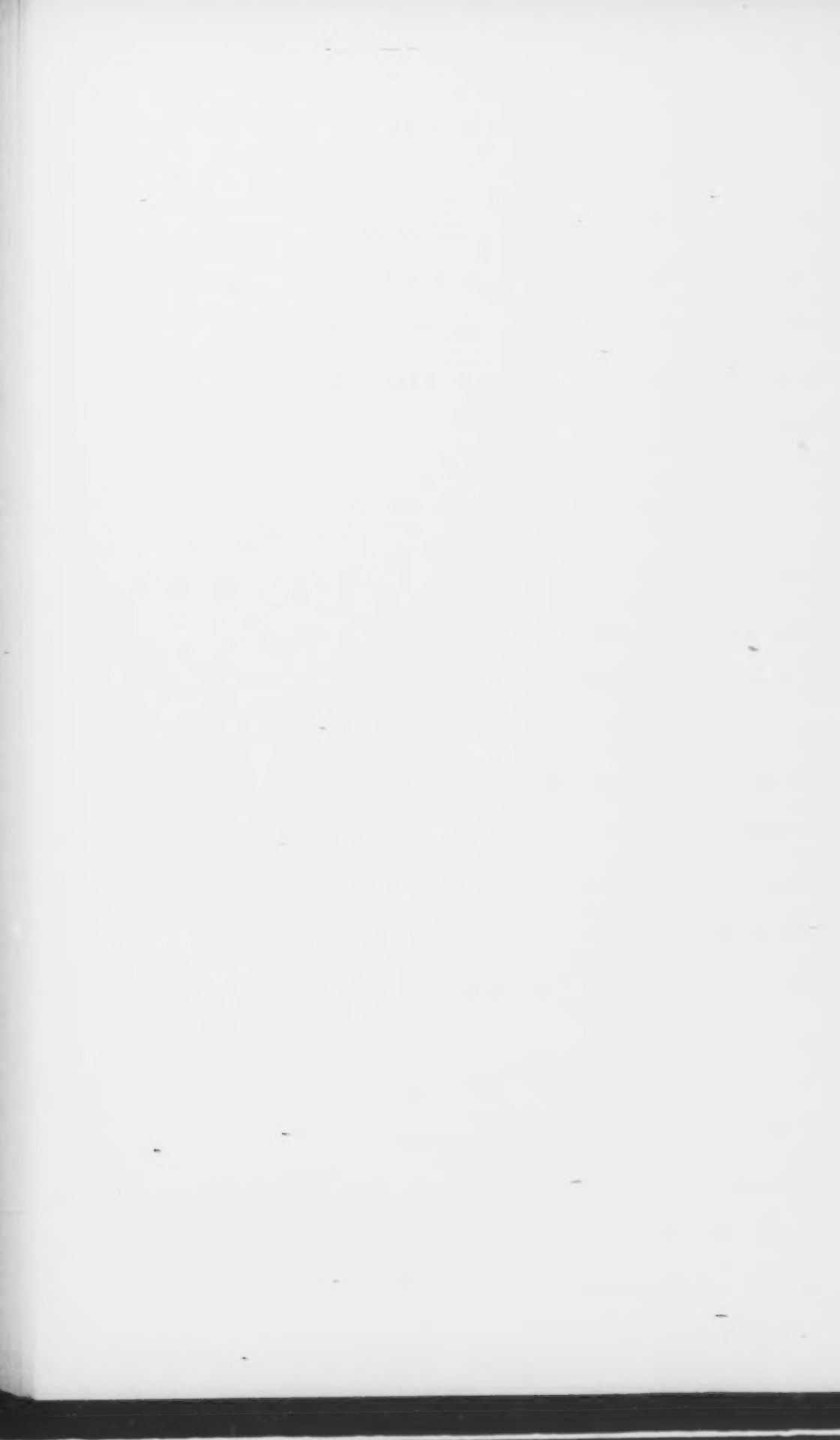
An Act to provide for an Exchange of Lands with the Indians residing in any of the States or Territories, and for their removal West of the River Mississippi, (Act of Congress, May 28, 1830 4 Stat. 411, Chapter 148).

Section 3:

...That in making any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same...

Section 7:

...That it shall and may be lawful for the President to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act, that he



is now authorized to have over them at present place of residence: Provided, That nothing in the act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any Indian tribes...

An Act to Organize the Territory of Kansas, (Act of May 30, 1854, ch. 59, section 19, 10 Stat. 283), Section 19:

...That nothing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with any Indian tribe is now, without the consent of said Tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Kansas, until such tribe shall signify their assent to the President of the United States

to be included within the said Territory of Kansas...

An Act for the Admission of Kansas
Into the Union (Act of January 29,
1861, ch. 20, section 1, 12 Stat. 126),
Section I:

...That nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indian tribe, is not, without the consent of such tribe, to be included within the territory limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said state, or to, affect the authority of the government of the United States to make any regulation respecting such

Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed...

An Act for the Issuance of Patents (11th Section of the Act of Congress, March 3, 1859, U.S. Statutes, Vol. 11, p. 430, Sess. 11, Ch. 82, 1859, 35th Congress.

...For surveying the necessary base, meridian, standard parallels, township, and section lines in Kansas and Nebraska, also outlines of Indian reservations, including liabilities incurred in the years eighteen hundred and fifty-five, eighteen hundred and fifty-six, eighteen hundred and fifty-seven, and eighteen hundred and fifty-eight, forty thousand dollars...

An Act to Provide for the partitioning of certain restricted Indian land in the State of Kansas, (Act of October 15, 1982, Public Law 97-344, 96 Stat. 1645)

...Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That any owner

of an interest in the following lands:...the
Newton-McNeer Shawnee Reserve Numbered 206...
Black Snake Shawnee Allotment Numbered 69...
Maria Christiana Miami Allotment...may
commence an action in the United States
District Court for Kansas to partition the
same in kind or for the sale of such land in
accordance with the laws of the State of
Kansas...Any conveyance ordered by the court
in such proceedings will be made in...a
restricted fee to Indian grantees...

An Act to Provide for the Use and
Distribution of funds awarded to the Shawnee
Tribe of Indians in dockets 64, 335, and 338
by the Indian Claims Commission and docket
64-A by the United States Court of Claims,
and for other Purposes, (Act of December 20,
1982, Public Law 97-372, 96 Stat. 1815).

...the funds appropriated...shall be
used and distributed as herein provided...The
Secretary of the Interior shall divide the
funds among the Absentee Shawnee Tribe of
Oklahoma, the Eastern Shawnee Tribe of
Oklahoma and the Cherokee Band of Shawnee

descendents as follows:...

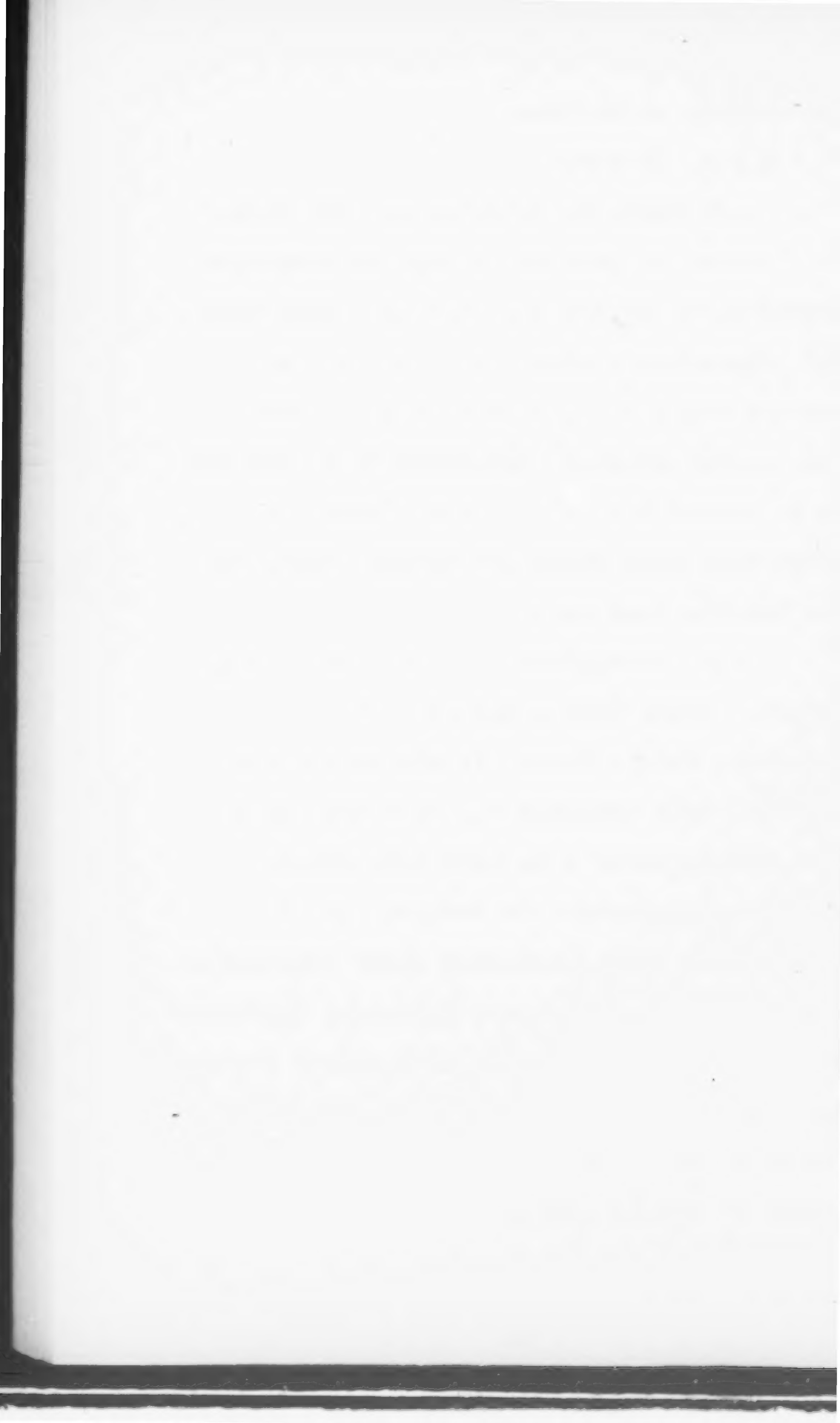
K.S.A. 79-3321:

...It shall be unlawful for any person:

...(a) To possess, except as otherwise specifically provided by the act, more than 200 cigarettes without the required tax indicia being affixed as herein provided...

...(n) To sell cigarettes to a retailer or at retail that do not bear Kansas tax indicia or upon which the Kansas cigarette tax has not been paid...

...(h) To wholesale cigarettes to any person, other than a manufacturer's salesman, retail dealer or wholesaler who is: (1) duly licensed by the state where such manufacturer's salesperson, retail dealer or wholesaler is located, or (2) exempt from state licensing under applicable state or federal or court decisions including any such person operating as a retail dealer upon land allotted to or held in trust for an Indian tribe recognized by the United States Bureau of Indian Affairs...



18 U.S.C. section 1151. "Indian Country": ...means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. section 3243.

...Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.



This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations...

25 U.S.C. section 1321:

...(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof...such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that



State...

28 U.S.C. section 1254 (1):

...(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...

(2)

No. 90-223

Supreme Court, U.S.
FILED
SEP 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

JIMMIE D. OYLER, SR.,

Petitioner,

vs.

THE HONORABLE EARLE D. JONES,

Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS**

MELINDA SWANSON WHITMAN
Assistant District Attorney
Johnson County, Kansas
P.O. Box 728
Olathe, Kansas 66061
(913) 791-5333
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the State of Kansas has jurisdiction to prosecute Jimmie D. Oyler, Sr., for possession and sale of untaxed cigarettes from a "smokeshop" located on private property and not operated by an Indian tribe even though he is allegedly a tribal member of the Cherokee nation and his "smokeshop" is allegedly located on allotted land and when he is not exempt from payment of state sales tax in violation of Kansas law.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed include:

Jimmy D. Oyler, Sr., defendant and petitioner here.

The State of Kansas, plaintiff and the appropriate respondent here.

The Honorable Earle D. Jones, District Judge of the Tenth Judicial District of the State of Kansas, Presiding Judge whose decision is sought to be reviewed, listed as respondent here.

Although petitioner has named the Honorable Earle D. Jones as respondent, the State of Kansas was the party in the decision sought to be reviewed and would more properly be the respondent here.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	v
Statement of the Case	1
Summary of the Argument	5
Argument for Denying the Petition	7
I. The petitioner's request for review should be denied.....	7
A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction	7
B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.....	8
C. Petitioner has not complied with the Rules of this Court.....	9
1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.....	9
2. The petitioner has not complied with Rule 13.1 of this Court because the petition for review was not timely filed ..	9
3. Petitioner's writ for review should be denied for lack of clarity and specificity in violations of Rules 14.1 and 14.5...	10

TABLE OF CONTENTS – Continued

	Page
D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.....	12
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES

<i>California State Board of Equalization v. Chemchuevi Indian Tribe</i> , 474 U.S. 9 (1985), <i>reh. denied</i> , 474 U.S. 1077 (1986) <i>cert. denied</i> , 481 U.S. 1051 (1987) ..	6, 12
<i>Dept. of Dental Hygiene of California v. Kirchner</i> , 380 U.S. 194 (1965), <i>on remand</i> , 43 Cal.Rptr. 329, 400 P.2d 321 (1965)	8
<i>Gotthilf v. Sills</i> , 375 U.S. 79 (1963).....	7
<i>Moe v. Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	4, 6, 12
<i>Sandquist v. California</i> , 419 U.S. 1066 (1974).....	7
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	4, 6, 12

STATUTES

Kansas Statutes Annotated 79-3321(a), (n)	1, 5
Kansas Statutes Annotated 79-3322.....	1, 2, 5
28 U.S.C. 1254(1)	7
28 U.S.C. 1257.....	5, 7

RULES

Rule 10.1(b), (c) Rules of the Supreme Court.....	9, 10
Rule 13.1, Rules of the Supreme Court.....	9, 10
Rule 14.1(e), (g), (h), (j), Rules of the Supreme Court	10, 11
Rule 14.5, Rules of the Supreme Court.....	10, 11



No. 90-223

In The
Supreme Court of the United States
October Term, 1990

JIMMIE D. OYLER, SR.,

Petitioner,

vs.

THE HONORABLE EARLE D. JONES,

Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS**

STATEMENT OF THE CASE

On January 23, 1990, the State of Kansas filed a criminal complaint charging Jimmie D. Oyler, Sr. with violations of Kansas law for the possession and sale of untaxed cigarettes pursuant to Kansas Statutes Annotated 79-3321(a) and (n) and 79-3322. Under those subsections of the Kansas Statutes, it shall be unlawful for any person:

79-3321. (a) To possess, except as otherwise specifically provided by this act, more than 200 cigarettes without the required tax indicia being affixed as herein provided.

* * *

(n) To sell cigarettes to a retailer or at retail that do not bear Kansas tax indicia or upon which the Kansas cigarette tax has not been paid.

The penalty provision is contained in KSA 79-3322(a):

79-3322. Penalties. (a) Any person who violates any of the provisions of this act, except as otherwise provided in this act, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both. In addition thereto any person found liable for any license or permit fee or tax imposed under the provisions of this act shall be personally liable for such license or permit fee or tax plus a penalty in an amount equal to 100% thereof.

The basis of the criminal complaint was contraband seized from Mr. Olyer's "Smokeshop" pursuant to a search warrant; specifically 8,888 cartons of cigarettes and four individual packs, none bearing tax stamps. After a trial to the court on April 3, 1990, the Honorable Earle D. Jones found petitioner guilty of violating Kansas law and sentence was pronounced on that date. Mr. Oyler immediately filed a notice of appeal and the case is currently on appeal in the Kansas Court of Appeals, with no opinion having yet been rendered. —

The petitioner's statement of the case contains numerous misstatements of the facts and asserts matters which were never part of the record in the trial court. Essentially, most of pp. 5-17 of petitioner's brief contain arguments, allegations and conclusions that are not facts of record in the case. As such, they are not properly considered by this Court in determining whether review by certiorari is warranted.

The facts of record established that the petitioner, Jimmie D. Oyler, Sr., privately owns roughly two acres of land which has been characterized as an allotment or is held by Mr. Oyler in some type of restricted status. (R. Vol. I, p. 77; Vol. III, pp. 40 & 63). On that private land Mr. Oyler owns and operates a private enterprise known as "Shawnee Jim's Indian Country Smokeshop". Mr. Oyler is 1/32 Cherokee Indian (R. Vol. I, p. 77).

The Cherokee nation in Oklahoma, of which petitioner claimed membership, did not have a tobacco ordinance at the time of this action. (R. Vol. III, p. 74). At no time has the Cherokee Tribe lived on, or controlled, petitioner's land. It has been held in his family exclusively. (R. Vol. III, p. 63).

On December 2, 1989, January 13 and 20, 1990, undercover agents with the Kansas Bureau of Investigation went to petitioner's "Smokeshop" and purchased cigarettes from the petitioner that did not have the required tax indicia and the officers did not pay state sales tax on the purchases. (R. Vol. 9-10, 14, 22, 25, 27-28). The undercover officers are not Indians or members of Mr. Oyler's "tribe" and petitioner never asked them if they were. (R. Vol. III, pp. 11, 25, 30). Mr. Oyler never disputed that he would sell cigarettes to anyone who came into his "Smokeshop". (R. Vol. III, pp. 68-69, 83).

Mr. Oyler has never applied for, nor received a cigarette tax license. (R. Vol. III, pp. 37, 50). Mr. Oyler is not exempt from payment of state sales tax. (R. Vol. III, p. 34). The Kansas Department of Revenue criteria for exemption are based on the pronouncements of this Court in

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

According to the Kansas Department of Revenue, Mr. Oyler did not qualify for an exemption from payment of Kansas state sales tax because: (1) the land on which he operates his "smokeshop" is not under the control of an Indian tribe; (2) the sales of cigarettes from his "smoke-shop" are not made by the tribe itself nor by a retailer approved by the tribe under regulations or ordinances adopted by tribal government; and (3) the cigarette sales by petitioner have not been restricted to members of the same tribe which controls the reservation and regulates the retailer. Sales made to non-Indians or members of other tribes are not exempt from payment of state cigarette and sales tax. (R. Vol. III, pp. 40-42, 48, 52). Petitioner has maintained at all times that his land is exempt from all laws and that he is not subject to any state laws. (R. Vol. III, p. 72).

In the criminal prosecution in Johnson County District Court, the petitioner filed a motion to dismiss the criminal complaint for lack of jurisdiction on February 22, 1990. That issue was fully briefed and addressed by the parties and, after a hearing on March 3, 1990, the motion was denied by the Honorable Earle D. Jones. (R. Vol. I, p. 6, and Vol. II). Subsequently, on March 3, 1990, petitioner filed a "Writ of Prohibition and/or Mandamus" with the Kansas Supreme Court which was denied by the Court on March 30, 1990, with a formal order filed on April 23, 1990. Petitioner's "Writ of Prohibition and/or Mandamus" was essentially a motion to stay the criminal proceedings.

On April 3, 1990, after a trial to the Court, the Honorable Earle D. Jones found the petitioner guilty of possessing more than 200 cigarettes without the required tax indicia being affixed as required by K.S.A. 79-3321(a) and 79-3322, and guilty of three counts of selling cigarettes at retail that did not bear Kansas tax indicia or upon which Kansas cigarette tax had not been paid in violation of K.S.A. 79-3321(n) and 79-3322. (R. Vol. I, p. 11). Petitioner has appealed that decision to the Kansas Court of Appeals. The issue on appeal is whether the trial Court had jurisdiction over him.

Petitioner's request for certiorari to the Kansas Supreme Court should be denied because it does not comply with any of the provisions for discretionary review by this Court.

SUMMARY OF THE ARGUMENT

Petitioner's request for review is prematurely filed as there has been no decision from the highest court of the State whose decision is sought to be reviewed. 28 U.S.C. 1257. Additionally, petitioner's request for review does not comply with the Rules of this Court and there is no provision for the relief petitioner is requesting. Accordingly, Respondent, State of Kansas, prays that petitioner's petition for "Writ of Certiorari to the Supreme Court of the State of Kansas" be denied in its entirety.

The facts in this case establish that the trial court found that it had criminal jurisdiction over Jimmie D. Oyler, Sr. The petitioner filed a "Writ of Prohibition and/or Mandamus" with the Kansas Supreme Court five days

before the criminal trial. Essentially, petitioner was requesting that the Kansas Supreme Court stay the criminal proceedings which it is declined to do. Petitioner was subsequently convicted by the trial court and has appealed those convictions. That appeal is currently pending in the Kansas Court of Appeals. The petitioner's brief here requests that this Court grant Certiorari to the Kansas Supreme Court. No provision exists for the relief requested by the petitioner. No final judgment has ever been entered by the highest court in Kansas. Petitioner has not cited the appropriate jurisdictional statute to this Court and has not complied with the Rules of this Court in the preparation of his petition.

The decision of the trial court finding that it had criminal jurisdiction over petitioner is firmly anchored in pertinent decisions of this Court from *California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1076 (1986), *cert. denied*, 481 U.S. 1051 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The petitioner was subsequently convicted of violations of Kansas statutes and has appealed that conviction to the intermediate appellate court in Kansas. The issue on appeal is whether the trial court had jurisdiction. If the Kansas Court of Appeals affirms the petitioner's conviction and the trial court's finding as to jurisdiction, the petitioner will still have the right of appeal to the Kansas Supreme Court.

Based on the foregoing, the petitioner's request for review is premature and should be summarily denied.



ARGUMENT FOR DENYING THE PETITION

- I. The petitioner's request for review should be denied.
 - A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction.

The petitioner's request for review by certiorari should be dismissed as this Court presently has no jurisdiction. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for the Court's jurisdiction. This is not the appropriate statute. The record in this case clearly establishes that the case involving petitioner's criminal conviction by a Kansas state district court is currently on appeal to the Kansas Court of Appeals. No federal circuit court of appeals has ever been involved in this case and, as such, 28 U.S.C. 1254(1) is not applicable. A review of the appropriate jurisdictional statute, 28 U.S.C. 1257, also leads to the result that this Court has no jurisdiction as there has been no final order from the state's highest court.

Supreme Court jurisdiction to review state court decisions is limited by 28 U.S.C. 1257 to "final judgments and decrees". Essentially, the requirement is that all opportunities for review by higher state courts be exhausted before a litigant invokes the jurisdiction of the Supreme Court. The judgment of a state trial court, or an intermediate appellate court, is not the judgment of the highest state court in which judgment could be had if the party seeking review has failed to invoke even the discretionary jurisdiction of a higher state court. *See, e.g., Sandquist v. California*, 419 U.S. 1066 (1974); *Gotthilf v. Sills*, 375 U.S. 79 (1963).

In this case, the petition for review by way of certiorari is premature. The petitioner did file a "Writ of Prohibition and/or Mandamus" after the trial court denied petitioner's "Motion to Dismiss" and found that it had jurisdiction. Nevertheless, the order of the Kansas Supreme Court denying a stay was not a final judgment of the court as to the issue of jurisdiction.

Petitioner has erroneously stated at page 20 of his brief that "the Kansas Supreme Court has decided the Treaty Issue in a way that conflicts with applicable decisions of this Court namely, that treaties are the Supreme Law of the land." As has been previously stated, the Kansas Supreme Court has never decided the issue of jurisdiction on the merits. The only order entered by the Kansas Supreme Court with reference to this case was that a stay of the criminal trial was not appropriate. That order is not a contrary decision on the "Treaty Issue."

B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.

The party requesting review by this Court must affirmatively show that the Court has jurisdiction. *See e.g., Dept. of Dental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965), *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965). It must affirmatively appear that a federal question was raised in the state court and that the federal question was actually decided. The petitioner has failed to sustain this burden.

C. Petitioner has not complied with the Rules of this Court.

An application to the United States Supreme Court for writ of certiorari to review the judgment of a state court must be made in the manner and within the time prescribed by statute and the Rules of the Supreme Court. The petition for review in this case does not comply with applicable statutes nor with the Rules of this Court.

- 1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.**

The highest court in Kansas, the Kansas Supreme Court, has not addressed the issue of jurisdiction over Mr. Oyler, which is the issue petitioner is presumably asking this Court to review. Further, the Kansas Supreme Court has never decided a federal question in a way which conflicts with the decision of another state court of last resort or of a United States Court of Appeals, a circumstance which is contemplated by Rule 10.1(b) before this Court will entertain discretionary review. Additionally, the decision of the trial court does not conflict with applicable decisions of this Court. Rule 10.1(c).

- 2. The petitioner has not complied with Rule 13.1 of this Court because the petition for review was not timely filed.**

Even if there was some provision which would allow this Court to review the finding of a Kansas state trial

court concerning the issue of jurisdiction, petitioner has not filed his request for review in a timely manner.

Rule 13.1 of this Court provides that a "petition for writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed . . . within 90 days after the entry of the order denying discretionary review." Petitioner is presumably proceeding under this rule, and, if so, the petition for review has not been timely filed.

The record reflects that the state district court's Journal Entry reflecting its denial of petitioner's Motion to Dismiss was filed on March 27, 1990 by the Clerk of the District Court of Johnson County, Kansas. There was no interlocutory appeal taken from that order, nor was there a motion for rehearing filed by the petitioner. As previously mentioned, the petitioner was found guilty in a trial to the court on April 3, 1990. The petitioner never filed a motion for new trial pursuant to Kansas procedure and the conviction is currently on appeal to the Kansas Court of Appeals. Even assuming that this Court would consider reviewing a decision of a trial court denying a motion to dismiss, the petitioner has not filed his petition for review in a timely manner. The Journal Entry denying petitioner's Motion to Dismiss was filed on March 27, 1990. The instant petition for review was not docketed by the Clerk of this Court until July 13, 1990, more than 90 days since the entry of that order. No review of that order has ever been requested nor denied.

3. Petitioner's writ for review should be denied for lack of clarity and specificity in violations of Rules 14.1 and 14.5.

Review by this Court on writ of certiorari is not a matter of right, but of discretion. Rule 10.1. Such a petition should be granted only when there are special and important reasons therefor. The petitioner has provided no special nor important reasons to the Court. The petitioner's request should also be denied for a violation of Rule 14.1, subsections (e), (g), (h), (j), and Rule 14.5.

It is not at all clear from the petition what is being requested. The petitioner has entitled his brief as a "Petition on Writ of Certiorari to the Supreme Court of the State of Kansas," yet on page 1 of his brief he requests that this Court review the judgment of the Kansas Supreme Court of April 23, 1990, denying his "Writ of Prohibition and/or Mandamus." The petitioner appears to argue in his brief, however, that this Court should review the decision of the trial court, The Honorable Earle D. Jones, denying his Motion to Dismiss. Petitioner has not concisely nor specifically set out what relief he is requesting from this Court, nor the legal basis on which the Court could grant that relief.

Accordingly, and pursuant to Rule 14.5 of this Court, the petition should be summarily denied because the petitioner's brief has failed to set forth with accuracy, brevity and clearness the essential facts necessary for this Court to consider. The Rule states that this alone is a sufficient reason for denying the petition for review.

D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.

The issue of whether states can validly tax sales of cigarettes from Indian "smokeshops" has been reviewed by this Court on several occasions. The petitioner in this case has consistently ignored those decisions. This Court has consistently held that a state has the right to require an Indian retailer to collect excise tax on cigarettes sold by a tribe to non-Indian purchasers. *See, e.g., California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The decisions in these cases were considered by the trial court in finding that it had jurisdiction over petitioner.

CONCLUSION

For the reasons articulated above, Respondent, State of Kansas, respectfully requests this Honorable Court to deny Mr. Oyler's petition for writ of certiorari in its entirety.

Respectfully submitted,

MELINDA SWANSON WHITMAN
Counsel of Record for
Respondent, State of Kansas

APPENDIX

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS,
CRIMINAL DEPARTMENT

STATE OF KANSAS,

Plaintiff,

vs.

No. K-62583

JIMMIE D. OYLER,

Defendant.

JOURNAL ENTRY

Now on this 5th day of March, 1990, this matter comes on for further proceedings before the Honorable Earle D. Jones, Judge of the District Court of Johnson County, Kansas. The State appears by Melinda S. Whitman, an Assistant District Attorney. The defendant appears in person and with his counsel, Pamela S. Thompson.

Thereupon, this matter comes on before the Court on the defendant's motion to dismiss the criminal Complaint.

The Court, being well and duly advised in the premises, denies the defendant's motion to dismiss. The matter is set for trial to the Court on the 3rd day of April, 1990 at 8:30 a.m.

/s/ _____

Earle D. Jones,
District Judge
Court Number 8
Johnson County
District Court

Submitted by:

/s/ _____

Melinda S. Whitman

11610/mas

Assistant District

Attorney

CERTIFICATE

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid, to Pamela Thompson, Attorney at Law, P.O. Box 104, Horton, Kansas 66439 on this 27th day of March, 1990.

/s/ _____

Melinda S. Whitman

SUPREME COURT ORDER
DISTRICT CASE NO. K62583

IN THE SUPREME COURT
OF THE STATE OF KANSAS

PAMELA S. THOMPSON
P.O. BOX 104
HORTON, KS 66439

JIMMIE D. OYLER	PETITIONER,
V	NO. 90-64967-S
HONORABLE EARLE D. JONES,	RESPONDENT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOW-
ING ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR WRIT OF PROHIBITION AND/OR
MANDAMUS.

DENIED.

DATE: 04/23/90

YOURS VERY TRULY
LEWIS C. CARTER
CLERK, SUPREME COURT
